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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 340.

THE CHEROKEE NATION AND THOMAS M. BUFFINGTON, JOSEPH M. LA HAY, JOHN R. McINTOSH, HENRY C. MEIGS, WHO SUE AS WELL FOR THEMSELVES AS FOR ALL OTHER CITIZENS OF THE CHEROKEE NATION OF INDIANS RESIDING IN THE INDIAN TERRITORY, APPELLANTS,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 31, 1902.

(18,549.)

(18,549.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 28, 1902.

a Court of Appeals of the District of Columbia, April Term, 1902.

THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Appellants,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
No. 1221.

Appeal from the supreme court of the District of Columbia.

b Supreme Court of the District of Columbia.

THE CHEROKEE NATION and THOMAS M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Complainants,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
No. 22712. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed October 23, 1901.

In the Supreme Court of the District of Columbia.

THE CHEROKEE NATION and THOMAS M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Complainants,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent.
No. 22712. In Equity, Docket 51.

To the honorable the chief justice and the associate justices of the supreme court of the District of Columbia:

Your orators, The Cherokee Nation, and Thomas M. Buffington, principal chief, and Joseph M. La Hay, treasurer, of the Cherokee

Nation, and John R. McIntosh and Henry C. Meigs, all citizens of the Cherokee Nation, who sue as well for themselves as for all other citizens of said nation, and who reside in the said Cherokee Nation, in the Indian Territory, respectfully represent unto your honors:

1. That the Cherokee Nation is a body politic whose existence as such has been recognized by the United States from the foundation of the Government of the United States unto the present time; that, it has an established government with a written constitution and a legislative council, similar to the legislatures in the several States, and its laws are printed in the English language soon after their enactment; that it
2 has entered into numerous treaties with the United States, and that it has received from the United States a patent to its lands which lands are hereinafter more particularly described. That your orator, Thomas M. Buffington, is the principal chief of said nation, and that as such he has taken an oath that he will, to the best of his ability, preserve, protect, and defend the constitution of the Cherokee Nation, and it is his duty to take care that the laws of the nation be faithfully executed; that Joseph M. La Hay is the treasurer of the nation, and as such he is authorized by the laws of the nation to collect all revenues which may be due and payable to the nation, and that he has given a bond for the faithful discharge of his duties; that John R. McIntosh and Henry C. Meigs, and the other complainants named are citizens of the Cherokee Nation, and that they all reside in the Cherokee Nation, in the Indian Territory, and are each entitled to all the rights, privileges and immunities of the other members of the Cherokee Nation of Indians; and that by a special act of Congress, passed at the second session of the 56th Congress they and all other members of the Cherokee Nation of Indians were declared to be citizens of the United States and entitled to all the rights, privileges and immunities of other citizens of the United States; that the citizens of said nation number over thirty-five thousand, and their names are too numerous to be inserted as parties to this suit; that said individual complainants, on this account, sue as well for themselves as for all other members of the Cherokee Nation of Indians who reside in the Cherokee Nation, in the Indian Territory.

3 2. That the respondent, Ethan Allen Hitchcock, is a citizen of the United States, a legal resident of the State of Missouri, temporarily residing in the District of Columbia, and holds the official position in the Government of the United States of Secretary of the Department of the Interior, and as such is charged with the supervision of Indian affairs and the execution of the laws of the United States relating to the same.

3. That by a treaty between the United States and the chiefs and head men of the Cherokee Nation west of the Mississippi, dated May 6, 1828, and proclaimed May 28, 1828, in article two (2) the United States agreed to "possess the Cherokees and to grant it to them forever," which guarantee was thereby solemnly proclaimed, of seven millions of acres of land, the boundaries of which are given in said article, together with and in addition thereto, a perpetual outlet west

and a free and unmolested use of all the country lying west of the western boundaries of the described limits as far as the sovereignty of the United States and their right of soil extended. Said treaty is printed at page 311 of the 7th U. S. Statutes at Large and the same is hereby referred to as an exhibit hereto.

4. That by article one (1) of a treaty between the United States and the Cherokee Nation, the 14th day of February, 1833, and proclaimed April 12th, 1834, the United States renewed the guarantee contained in the aforesaid article two (2) in the above-mentioned treaty of May 6th, 1828, of seven millions of acres of land and the perpetual outlet west described therein, with the reservation only of the right to permit other tribes of red men to get salt from any
saline, or salt plain that might be found on the great western
4 prairies within the limits of the said outlet and with the
promise that "letters patent shall be issued by the United States as soon as practicable for the lands hereby guaranteed." Said treaty is published at page 414 of the 7th Statutes of the United States at Large, and the same is hereby referred to as an exhibit hereto.

5. That by article two (2) of a treaty of December 29th, 1835, between the United States and the chiefs and head men of the Cherokee people, the said guarantees contained in the two treaties hereinbefore mentioned of May 6th, 1828, and February 14th, 1833, were referred to and quoted and a further session of a tract of country described therein, estimated to contain eight hundred thousand acres was made to be conveyed to the Cherokee Nation, and their descendants, by a patent to be issued by the United States.

6. That by article three (3) of the said treaty of December 29th, 1835, the United States agreed that the land ceded in said article two (2) of said treaty, estimated to amount to eight hundred thousand acres, together with the lands ceded by the treaty of 1833, including the outlet, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States according to the act of May 28th, 1830. Said treaty is published at page 478, 7th Statutes at Large of the United States, and is hereby referred to and made an exhibit hereto.

7. That by a patent dated December 31st, 1838, the lands granted in the treaties hereinabove referred to were conveyed to the Cherokee Nation, the following being the language of the habendum
5 clause thereof, to wit:

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States, has given and granted, and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of lands, so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre, and to have and hold the same, together with all the rights, privileges and appurtenances thereto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred

to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner, in which said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eight- of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same." A copy of said patent is attached hereto marked Exhibit No. 1.

8. That by the grants contained in the several treaties hereinbefore mentioned and the conveyance of the lands thereby granted
6 by the patent referred to, the Cherokee Nation became the owner in fee-simple of the lands so granted and conveyed without any right of reversion, unless the nation should become extinct, or should abandon said lands, neither of which contingencies has happened.

9. It was also covenanted and agreed by said treaty of 1835, that the said lands, thus ceded to the Cherokee Nation, should in no future time, without the consent of said nation, be included within the territorial limits or jurisdiction of any State or Territory; but that the United States would secure to the Cherokee Nation the right by their national council, to make and carry into effect all such laws as the Cherokees may deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as have connected themselves with them. That by the terms of the treaty of 1846 it was provided; "That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall issue for the same." That said patent was to be in conformity with the treaties theretofore made and, in conformity with the act of Congress of May 28, 1830, which authorized the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged with them," and if they prefer it that the United States will cause a patent or grant to be made and executed to them for the same; and that the only condition attached to said grant was that the lands should revert to the United States, if the Indians became extinct, or abandoned the
7 same. That the patent indicated and promised by this treaty of 1846 was never executed or delivered to said nation, but the said treaty furnishes the construction which is to be placed on the treaties and patent theretofore executed. That during the 63 years which have elapsed since said patent was executed and delivered, its provisions have been recognized and observed by all the officials and departments of the Government of the United States;

that the Cherokee Nation has never, by any act of its national council or otherwise, agreed to relinquish to the United States its right and the right of its citizens to the exclusive use, control and occupancy of any of the seven millions of acres of its lands, upon which the Cherokee people now reside, nor has said nation ever agreed to authorize any officer or department of the United States to grant persons or corporations, not citizens of the Cherokee Nation, the right to use, or occupy any of the lands of the nation for the purpose of cultivation, mining or for any other purpose whatever, except in some instances for the right of way for railroad corporations.

10. Your orators further represent unto your honors, that numerous applications have been made to the respondent, as Secretary of the Interior, by persons who are not citizens of the Cherokee Nation, for leases of lands belonging to said nation for the purpose of mining in said nation for oil, gas, coal and other minerals; that among such applications, is the application of a corporation, known as the Cherokee Oil and Gas Company, which it is alleged was organized under the laws of the State of Arkansas, but the names of the stockholders of which are unknown to your orators; that said applica-

8 tion is for a lease or leases upon about ninety-four thousand acres of land belonging to the Cherokee Nation, and now occupied by citizens of the nation, under the laws and customs of the nation and used by them for agricultural and grazing purposes.

11. That the lands in the Cherokee Nation will in the near future, and in all probability within the next two years, be allotted to the citizens thereof and each of whom will be entitled to his proportionate share of said lands; that it is the desire of said citizens to take their respective allotments free from any encumbrance whatever, and especially free from any mining claims or leases upon such lands; that under the said treaties and the patent from the United States, said lands are the sole and exclusive property of the Cherokee Nation, which holds them in trust for all the members of the tribe, except as otherwise provided in treaties and agreements with the United States and other Indian tribes; that "the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them," as provided in section 2 of article 1 of the constitution of the Cherokee Nation; that numerous citizens of the said nation are now in possession of the lands embraced in said application and have made improvements thereon, which are their exclusive property.

12. Your orators are informed and believe that the said respondent, as Secretary of the Interior, is now giving favorable consideration to said application to the extent of a lease, or leases, upon eighteen sections, or upon eleven thousand five hundred and twenty (11,520) acres of said lands; for the purpose of mining for oil and

9 gas thereon for the period of 15 years, and your orators are informed and believe that said respondent is about to grant said application to said extent and for said purpose and

time and thereby is threatening to deprive your orators, and the other members of the Cherokee Nation of Indians of their right to the exclusive use and occupation of said lands; and that said respondent is as your orators are informed and believe, about to execute a lease or leases upon all or a part of said eighteen sections of land to said corporation in utter disregard of the provisions of said treaties and the patent of the United States granting to the Cherokee Nation the said seven millions of acres of land, and the right of its citizens to their exclusive use and occupancy, and notwithstanding the fact that the individual members of the Cherokee Nation have a right to use parcels of the land held by the nation for the benefit of all its members, subject only to such rules as its governing authority may prescribe (117 U. S. 288); and notwithstanding the further fact that, by the execution and delivering of a patent to said lands to the Cherokee Nation, the Secretary of the Interior and the Interior Department ceased to have any further official duties to perform in respect to said lands in so far as their control, use and occupancy are concerned. And that the granting of said application in whole or in part, and the leasing of said lands or any part thereof, to said corporation will deprive the said nation and its citizens of the right to the exclusive use and occupation of said lands to the extent that mining leases may be granted to said lands by said respondents, and the granting of such lease or leases will be in violation of the rights of property secured to its citizens by the Constitution of the United States, and of the solemn treaty provisions existing between the said nation and the United States, and in violation of the letter and spirit of the provisions of the patent to said lands granted to said nation by the United States; and unless restrained by this honorable court said respondent will cause irreparable injury, wrong and oppression to, and deprivation of, the property rights of your orators and of all other citizens of the Cherokee Nation of Indians; that said eighteen sections of land are of great value, to wit, of the value of ten dollars an acre, at least, and that said lands are believed to contain coal, oil, or petroleum to very large amount, and that the right to mine said lands for oil is of very great value.

13. Your orators pray that the said respondent, Ethan A. Hitchcock, Secretary of the Interior, and his counselors, attorneys, solicitors and agents, and all other officials clerks, agents and employees of the United States acting under the orders and instructions of said respondent, may be restrained by an injunction issuing out of this honorable court from proceeding further in the matter of granting said application or any part thereof for mining leases on said lands, and from proceeding further against your orators and against the other members of said Cherokee Nation of Indians, in the matter of the granting of said application or any part thereof, or in the matter of considering, hearing or granting any other application or applications that have been made, or may hereafter be made, for mining leases to land in said nation, by any person or persons whomsoever; and that your orators and the other members of said nation of Indians, in whose behalf this suit is brought, may have such other and

further relief as the nature of this case and equity and good conscience may require.

11 14. And may it please your honors to grant unto your orators the writ of injunction, issuing out of and under the seal of this court, directed to the said Ethan A. Hitchcock, his counselors, attorneys, solicitors and agents and all other officers, clerks, agents and employees of the United States acting under the orders and instructions of said respondent, commanding them and each of them to absolutely desist and refrain from doing any of the acts and things complained of as set forth herein, and especially from proceeding further in the matter of granting the application of the said Cherokee Oil and Gas Company, or any part thereof, for mining leases on any of the lands belonging to the Cherokee Nation, or from granting to any other person or persons whomsoever any mining rights privileges or leases on or to any of the lands belonging to the Cherokee Nation.

15. And your orators further represent unto your honors that they and the other members of the Cherokee Nation of Indians, in whose behalf this suit is brought, are wholly without adequate remedy at law, that failure to grant the relief prayed will cause a multiplicity of suits in said Cherokee Nation and cast a cloud upon the title of the Cherokee Nation to said lands, and depreciate their value as the prospective allotments of individual citizens of the nation, and that the granting of mining leases on or to said lands will result in irreparable injury and loss to your orators and to, all the citizens of the Cherokee Nation. Your orators therefore pray your honors to grant unto your orators, pending a final hearing of this case, a temporary injunction, directed to said Ethan A. Hitchcock, issued in the words as aforesaid, restraining him, his

12 counselors, attorneys, solicitors and agents and all other officers, clerks, agents and employees of the United States acting under his orders and instructions, commanding them and each of them to absolutely desist and refrain from doing any of the acts and things complained of as herein set forth, and especially from proceeding further in the matter of granting the application of said corporation or any part of such application; or the application of any other persons whomsoever for mining leases on the lands belonging to the Cherokee Nation, and that your honors will grant unto your orators temporarily such other and further relief as the nature of this case and equity may require.

And upon a final hearing of this cause, your orators pray that said injunction may be made perpetual, and that said respondent pay the costs of this suit.

16. To the end, therefore, that said respondent may, if he can show why your orators should not have the relief hereby and herein prayed for, and may, upon his corporate oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written he is required to answer; that is to say:—

1. Whether it is not a fact that the aforesaid Cherokee Oil and

Gas Company, a corporation organized under the laws of the State of Arkansas, has made and filed in the office of the Secretary of the Interior an application for a mining lease or leases to lands in the Cherokee Nation, to the amount of ninety-four thousand acres, to run for the period of fifteen years, and whether it is not a fact that the said respondent is about to grant such application as

13 to a portion of said lands?

2. Whether it is not a fact that treaties were made and executed between the United States and the Cherokee Nation as set forth in paragraphs 3. 4. 5 and 6 of the foregoing bill of complaint, and whether said treaties did not contain agreements to the effect that the United States would cede to the Cherokee Nation seven million acres of land west of the Mississippi river, being the lands upon which the Cherokee Indians, who are citizens of said nation, now reside?

3. Whether it is not a fact that, in pursuance of the provisions of said treaties, the United States did execute and deliver to the Cherokee Nation a patent to said seven million acres of land, and that said patent was dated December 31st, 1838, and that it gave and granted to said Cherokee Nation the said seven million acres of land, together with all the rights, privileges and appurtenances thereto belonging, to said Cherokee Nation forever; and that said lands were not to revert to the United States unless said nation of Indians became extinct or abandoned said lands?

4. Whether it is not a fact that, in conformity with an act of Congress of May 28, 1830, the President of the United States assured the Cherokee tribe of Indians or nation, that the United States would forever secure and guarantee to them and their heirs or successors the country or lands upon which said Cherokees reside?

5. Whether it is not a fact that the Cherokee Nation has never relinquished the right of its citizens to the exclusive use and occupation of said lands?

14 6. Whether it is not a fact that there are other applications for leases of lands in the Cherokee Nation for mining purposes, made by persons, not citizens of the Cherokee Nation, now pending in the Interior Department?

7. Whether it is not a fact that said respondent is now considering the application of the said Cherokee Oil and Gas Company, and that he is about to grant said application to the extent of eighteen sections of land, which are embraced in said application and which lands belong to the Cherokee Nation?

17. Therefore, will your honors grant unto your orators the writ of subpœna, issuing out of and under the seal of this court, to be directed to the said respondent, Ethan A. Hitchcock, commanding him, by a certain day, and under a certain penalty therein inserted, to appear before your honors, in the supreme court of the District of Columbia, aforesaid, and then and there answer the premises, and abide the order and decree of the court.

WILLIAM M. SPRINGER,
Solicitor for Complainants Henry C. Meigs.

NOTE.—The respondent, Ethan A. Hitchcock, is required to answer the interrogatories numbered respectively 1, 2, 3, 4, 5, 6 and 7.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

On this 23rd day of October, 1901, before me, personally appeared
Henry C. Meigs, one of the complainants in the foregoing
15 bill of complaint, and makes oath that the statements therein made, as of his own, or complainant's knowledge, are true, and those on information he believes to be true.

JOHN R. YOUNG, *Clerk.*

16 EXHIBIT No. 1.

Patent.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by certain treaties made by the United States of America, with the Cherokee Nation of Indians of the sixth of May, one thousand eight hundred and twenty-eight, the fourteenth of February, one thousand eight hundred and thirty-three, and the twenty-ninth of December, one thousand eight hundred and thirty-five, it was stipulated and agreed on the part of the United States, that in consideration of the promises mentioned in the said treaties, respectively, the United States should guaranty, secure and convey by patent to the said Cherokee Nation certain tracts of land; the description of which tracts, and the terms and conditions on which they were to be conveyed, are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, in the words following, that is to say:—

"Article 2d. Whereas by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, with the Cherokees west of the Mississippi, the United States guaranteed and secured, to be conveyed by patent to the Cherokee Nation of Indians the following tract of country: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said
17 north point south in the said territorial line, where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river, at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence, in a straight line, to a point four miles northerly from the mouth of the north fork of the Canadian, thence along the said four-miles line to the Canadian, thence, down the Canadian to the Arkansas; thence, down the

Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory, as now defined, to the southwest corner of Missouri, thence, along the western Missouri line to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river, thence, up said Grand river, as far as the south line of the Osages, extended, if necessary; thence, up and between said south Osages line, extended west, if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from the said Osage line to said due west line, will make *seven millions of acres* within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee Nation *a perpetual outlet west* and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended. *Provided, however,* That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States
18 to permit other tribes of red men to get salt on said plain, in common with the Cherokees, and *letters patent* shall be issued by the United States as soon as practicable for the land hereby guaranteed. *And whereas*, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accom-odation of the whole nation, on their removal west of the Mississippi the United States, in consideration of the sum of *five hundred thousand dollars* therefore hereby covenant and agree to convey to the said Indians and their descendants, by patent, in fee simple, the following *additional tract of land*, situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south, fifty miles; thence west to the place of beginning; estimated to contain *eight hundred thousand acres of land;* but it is expressly understood, that if any of the lands assigned the *Quapaws*, shall fall within the aforesaid bounds, the same shall be reserved and excepted out of the lands above granted, and a *pro rata* reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

Art. 3d. The United States also agree that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May twenty-eight, one thousand eight hundred and thirty. It is,
19 however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post, and have no further use for the same, it shall revert to the Cherokee Nation. The United States

shall always have the right to make and establish such *post* and *military roads* and *forts*, in any part of the Cherokee country, as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds, for the construction and support of the same, as may be necessary. *Provided*, That if the private rights of individuals are interfered with, a just compensation therefore shall be made." *And whereas*, the United States have caused the said tract of seven millions of acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: Beginning at a mound of rocks four feet square at base, and four and a half feet high, from which another mound of rocks bears south one chain, and another mound of rocks bears west one chain, on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty-eight chains to a post on the northeast bank of the Virdigris river, from which a hackberry, fifteen inches diameter, bears south sixty-one degrees thirty-one minutes east, forty-three links, marked C. H. L. and a cottonwood forty-two inches diameter bears south twenty-one degrees fifteen minutes east, fifty links, marked C. R. K. L.; thence down the Virdigris river, on the northeast bank, with its meanders to the junction of the Virdigris and Arkansas rivers; thence from the lower bank of Virdigris river on
20 the north bank of Arkansas river, south forty-four degrees, thirteen minutes, east, fifty-seven chains, to a post on the south bank of Arkansas, opposite the eastern bank of Neosho river, at its junction with Arkansas, from which a red oak thirty-six inches diameter, bears south seventy-five degrees, forty-five minutes west, twenty-four links, and a hickory, twenty-four inches diameter, bears south eighty-nine degrees east four links; thence south fifty-three degrees west, one mile to a post from which a rock bears north fifty-three degrees east, fifty links and a rock bears south eighteen degrees, eighteen minutes west, fifty links; thence south eighteen degrees, eighteen minutes west thirty-three miles twenty-eight chains and eighty links, to a rock from which another rocks bears north eighteen degrees eighteen minutes east fifty links, and another rock bears south fifty links, thence south four miles to a post on the lower bank of the north fork of Canadian river, at its junction with Canadian river, from which a cottonwood, twenty-four inches diameter, bears north eighteen degrees east, forty links, and a cottonwood, fifteen inches diameter, bears south nine degrees east fourteen links; thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of Arkansas river, four chains and fifty-four links, east of Fort Smith; thence north seven degrees, twenty-five minutes west, with the western boundary of the State of Arkansas, seventy-six miles, sixty-four chains and fifty links, to the southwest corner of the State of Missouri; thence north on the western

boundary of the State of Missouri, eight miles, forty-nine
21 chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high, in which is a post marked on the south side Cor. n. Ch. Ld.; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river, from which a maple, eighteen inches diameter, bears south thirty-one degrees east, seventy-two links; thence up Neosho river, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty-six chains and fifty links, west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of Neosho river; thence west on the southern boundary of the Osage lands, to the line dividing the territory of the United States from that of Mexico, two hundred and eighty-eight miles, thirteen chains and sixty-six links, to a mound of earth, six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence south along the line of the territory of the United States and of Mexico sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence east, along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty-six links, to the beginning; containing within the survey *thirteen millions, five hundred and seventy-four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre.* *And whereas*, the United States have also caused the said tract of eight hundred
22 thousand acres to be surveyed, and have ascertained the boundaries thereof to be as follows:

Beginning at southeast corner of Osage lands, described by a rock, from which a red oak twenty inches diameter bears south twenty-seven degrees east, seventy-six links, and burr oak, thirty inches diameter, bears south fifty-nine degrees west one chain; and another burr oak, thirty inches diameter bears north eight degrees west, one chain and thirty-seven links; and another burr oak forty inches diameter bears north thirty degrees west, one chain and eighty-one links and running east twenty-five miles to a rock on the western line of the State of Missouri, from which a post oak ten inches diameter bears north forty-eight degrees, thirty minutes, east, four chains, and a post oak twelve inches diameter bears south sixty-two degrees east, five chains; thence north, with the western boundary of the State of Missouri, fifty miles, to a mound of earth five feet square at base and four and a half feet high; thence west twenty-five miles to the northeast corner of the lands of the Osages, described by a mound of earth six feet square at base and five feet high; thence south along the eastern boundary of Osage lands, fifty miles, to the beginning; containing eight hundred thousand acres.

Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have *given* and *granted*, and by these presents do *give* and *grant*, unto the said Cher-

okee Nation, the two tracts of land, so surveyed and hereinbefore described, containing in the whole *fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre*, to have and to hold the same, together with all the rights, privileges and appurtenences thereto be-
23 longing to the said Cherokee Nation forever; subject, however to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner, in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eight- of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same.

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirty-first day of December, in the year of our Lord, one thousand eight hundred and thirty-eight, and of the Independence of the United States, the sixty-third.

By the President,

[SEAL.] M. VAN BUREN.

(Signed) H. M. GARLAND,
Recorder of the General Land Office.

24 *Rule to Show Cause.*

Filed October 23, 1901.

In the Supreme Court of the District of Columbia.

THE CHEROKEE NATION ET AL.
vs.
ETHAN A. HITCHCOCK, The Secretary of the Interior. } No. 22712. Equity. Docket 51.

Upon consideration of the bill in the above-entitled cause, it is, this 23rd day of October, A. D. 1901, ordered that the defendant show cause, if any he has, on the 31st day of October, 1901, at eleven (11) o'clock a. m., why temporary injunction should not be granted as therein prayed, provided a copy of this order be served upon said defendant on or before the 26th day of October, 1901.

A. B. HAGNER, *Justice.*

Marshal's Return.

Served copy of within order—on defendant personally, Oct. 23, 1901.

AULICK PALMER, *Marshal.*

25 *Demurrer.*

Filed November 1, 1901.

In the Supreme Court of the District of Columbia.

THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Complainants,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent.
} In Equity.

The above-named defendant by protestation, not confessing or acknowledging all or any of the matters and things in the complainants' bill to be true in such manner and form as the same are therein set forth and alleged, does demur to said bill of complaint upon the following grounds:

1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or to any relief;

2. The court has no jurisdiction over the subject-matter of the suit;

3. There is a defect of parties defendant.

WILLIS VAN DEVANTER,
Assistant Attorney General.

Defendant will urge, as reasons for demurrer:

1. That the matters named in the bill are matters of administration, which cannot be taken away from an executive department and carried into the courts;

26 2. That the Cherokee Oil and Gas Company, named in the bill, is a necessary party to the suit, as shown by the bill;

3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898 (30 Stat., 495) which is a valid exercise of the power of Congress over the property of an Indian tribe.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

WILLIS VAN DEVANTER,
Assistant Attorney General.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Ethan A. Hitchcock, who, as Secretary of the Interior, is the defendant in the above-entitled suit, being duly sworn, on oath says, that the foregoing demurrer is not interposed for delay.

E. A. HITCHCOCK.

Subscribed in my presence and sworn to before me this first day of November, A. D. 1901.

WM. H. DE LACY,
Notary Public, D. C.

[SEAL.]

27 *Decree.*

Filed May 6, 1902.

In the Supreme Court of the District of Columbia.

THE CHEROKEE NATION ET AL. }
vs. } In Equity. No. 22712.
ETHAN A. HITCHCOCK ET AL. }

Come now the parties to this cause, by their respective solicitors, and by the agreement of the parties stated in open court this cause is at this time submitted to the court upon the demurrer of the respondents to the complainants' bill and the same being argued by counsel and the court, being fully advised in the premises, does now consider, order, and decree that the said demurrer be, and the same is hereby sustained, and the complainants electing to stand upon their said bill, it is, by the court, considered, ordered, and decreed that the bill of complaint be, and the same is hereby dismissed; that the respondents go hence without day, and that the respondents recover from the complainants their costs, to be taxed by the clerk. Whereupon the complainants take an appeal to the Court of Appeals of the District of Columbia and ask that the same be noted in this decree, which is accordingly done; and the amount of the bond to be given by appellants to cover costs is hereby fixed at one hundred dollars in lieu of giving bond, the complainants, at their option, may deposit in the clerk's office the sum of one hundred dollars to cover such costs.

Dated, May 6, 1902.

A. B. HAGNER, *Justice.*

28 *Opinion of Justice Hagner.*

Filed May 7, 1902.

In the Supreme Court of the District of Columbia.

THE CHEROKEE NATION and THOMAS M. Buffington, Principal Chief; Joseph M. La Hay, Treasurer, and John R. McIntosh and Henry C. Meigs *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior.	No. 22712. Equity.

This bill is filed in the name of the Cherokee Nation and of Buffington, principal chief of the Cherokee Nation, of La Hay, treasurer, and of McIntosh and Meigs, citizens of the nation, "who sue as well for themselves as for all other citizens of said nation, and who reside in the said Cherokee Nation in the Indian Territory.

Their ground of complaint is that the defendant, as Secretary of the Interior, is about to execute divers leases to persons not citizens of the Cherokee Nation and among others to a corporation organized under the laws of the State of Arkansas by the name of the Cherokee Oil and Gas Company, for the purpose of mining upon lands belonging to the nation for oil, gas, coal and other minerals; and the contention of the complainants is that the act of Congress, under which the Secretary claims the right to grant such leases does not confer the power so claimed by a just construction of its terms: and that if any such statute did confer such power in express terms, it would be unconstitutional, and therefor void and inoperative against the several treaties entered into between the United States and the Cherokee Nation, and in derogation of the patent
29 signed by the President under the authority of the treaties and the direction of the act of Congress requiring the issuing of the patent.

The prayer of the bill is that an injunction shall issue forbidding the Secretary from granting any leases under the supposed power conferred by the act of Congress relied on by the Secretary; and particularly from granting the contemplated mining leases for 94,000 acres of land belonging to the Cherokee Nation, and now occupied by its citizens for agricultural and grazing purposes, to the Cherokee Oil and Gas Company for a term of fifteen years, in violation of the rights of the Cherokee Nation and to the irreparable injury of its people.

The Secretary interposed a demurrer to the bill, and for grounds of objection insisted, in effect:

First. That the matters in the bill set forth involve questions of political administration which properly appertain to the executive department of the Government and cannot be taken from its cognizance by the orders of the court.

Second. That the Cherokee Oil and Gas Company is a necessary party to the suit; and

Third. That the acts of the defendant are in conformity with the power properly granted by the act of Congress approved 28th June 1898 (30 Stats. 495), which is a valid exercise of the power of Congress over the property of an Indian tribe.

The questions thus presented were very elaborately argued by counsel. There was then pending before the Court of Appeals the cause of Lone Wolf and others *vs.* The Secretary of the In-
30 terior, which involved many of the questions raised in the case at bar, and for that reason and in compliance with the suggestion of counsel on each side the determination of the present cause was postponed until the decision of the Court of Appeals should be announced.

In the meantime the case of Primeau and others, members of the Sioux tribe residing on the Standing Rock reservation against the Secretary of the Interior, was argued before this court, which presented the claim of the Indians on the reservation named to be protected by injunction from the action of the Secretary in granting leases of portions of their unoccupied lands, under the so-called "permit system" for grazing purposes under the authority of an act of Congress.

The arguments on each side were effectively the same as those presented in the Lone Wolf case; and upon the announcement of the decision of the Court of Appeals in that case, I sustained the demurrer in the Primeau case and dismissed the bill. But, as the counsel in the present cause had so earnestly insisted that the facts here so greatly differentiated the Cherokee case in important particulars from the cases in which the rulings before referred to were made, I withheld my decision for further consideration.

The Court of Appeals in the Lone Wolf case recognized the position so frequently declared by the supreme court that the right of occupancy conferred upon the Indian tribes could not be regarded as a vested right of property of which they could not be divested or deprived without due process of law and upon payment of just compensation.

The court said: "Clearly, there is no authority for this contention. The Indians within the United States or their jurisdiction,
31 have, from the earliest period of the Government, been regarded and treated as the mere wards of the Government, and the lands and reservations occupied by them have been assigned to them by the United States as places of domicil for the tribes, and they hold and occupy such lands with the assent of the United States, and under their authority. Such lands and reservations are held by the Indians subject to the control and dominion of the United States, and such Indian tribes are subject to be changed from one locality or reservation to another, as may best serve the purposes and policy of the Government in the administration of Indian affairs. They have no title in the lands they occupy, except in certain cases where treaties of settlement may have conferred a title in the land; their right is simply to occupy, at the

will of the Government and under its protection. As was said by the Supreme Court, in the case of United States *v.* Kagama, 118 U. S. 379, 'The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else,—because the theater of its exercise is within the geographical limits of the United States,—because it has never been denied, and because it alone can enforce its laws on all the tribes.' Keeping in mind, therefore, the dependent relation of the Indian tribes to the United States, and the nature of the right under which they occupy the lands assigned to them, it is quite clear there is no room for the application of the principle of due process of law as between the Indians and the United States, in a case such as the present. The question is not of a private right, but is of a public qualified right of occupancy by
32 the Indian tribes, and no portion of the Indians can set up or assert any mere individual right as a vested right in the lands as against the Government. The power and control over the subject-matter is vested in Congress, and is therefore a political as distinguished from a judicial subject of inquiry. The agreement of cession and the act of Congress ratifying and adopting such agreement, stand as the deliberate legislative judgment upon the subject, and no matter what terms we may apply to those acts, whether due process of law or some other terms, the agreement of cession as ratified, and the act of Congress ratifying the same, are conclusive: (Murray's Lessee *v.* Hoboken Land Im. Co. 18 How. 272, 285), and no judicial inquiry can be allowed to bring those acts into question; the subject-matter being plainly within the limit of congressional power."

That court also held that where the provisions of a treaty with an Indian tribe are at variance with a subsequent act of Congress, the treaty must yield and the act of Congress must be allowed full force and operation.

Of course, these general expressions in the opinions cited must be held as applicable to all tribes of Indians alike, unless there is made to appear some substantial reason why any particular tribe should be exempt from their application.

In like manner, in the absence of some exception in favor of a particular tribe, the provisions of sec. 13 of the act of 28 June 1898, ch. 817, must be held to apply to all the five civilized Indian tribes alike. The 13th section of that statute authorizes and directs the Secretary of the Interior from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt and other minerals in the Indian Territory, and declares
33 all such leases shall be made by the Secretary of the Interior, and that any lease for any such minerals otherwise made, shall be absolutely void; and the residue of the section provides regulations as to the duration, dimensions, royalties and sundry other matters connected with leasing of the *of the* mineral lands. That the provisions of that act effectively confer upon the Department of the Interior the sole right to grant such leases, and declares

all leases not issued by the Secretary to be void, is clear; and if these provisions apply to the lands of the Cherokee Nation, the leases sought to be enjoined by this suit may lawfully be granted by that officer.

The only reason assigned for exempting the Cherokee Nation from the effect of these decisions and of the act of Congress before us, is based upon the broad language of the treaties of May 6, 1828, art. 2, (7 Stats. 311); of February 14, 1833, art. 1, (7th Stats. 414); of December 29, 1835, arts. 2 & 3 (7th Stats. 478); and of the patent issued to the Cherokee Nation on the 31st December 1838. The particular averment in the bill on this point is "that by the grants contained in the several treaties hereinbefore mentioned, and the conveyance of the lands thereby granted by the patent referred to, the Cherokee Nation *became the owner in fee-simple of the lands so granted and conveyed*, without any reservation, unless the nation should become extinct or should abandon said lands, neither of which contingencies has happened."

In the opinion of the Court of Appeals on the motion for a rehearing in the Lone Wolf case, attention is called to the fact that "the treaty relied on in the case did not vest in the Indians, either
34 in their individual or tribal capacity, anything more than the right to occupy the lands as against the United States until it was found necessary to make other provisions for them. There was no grant of estates, either of freehold or leasehold, only a mere right to occupy and use the lands, according to the habits and customs of the Indians."

The contention of the Cherokee Nation in the present cause would tend to place the quality and extent of their title and the possession of their lands upon higher grounds, if their contention is correct. But I do not see that the treaties and the patent cited confer upon the Cherokees the extensive title claimed by the pleader in the above section of the bill.

By the terms of the treaty of 1828, the United States "agree to possess and guarantee to the Cherokees forever" seven millions of acres of land; but with no qualification of the extent and character of the possession thus guaranteed.

By the treaty of 1833, the United States repeat this guarantee as to the 7,000,000 acres; and in addition the United States further guarantee to the nation a perpetual outlet west and a free and unmolested use of all the count-y lying west of the western boundary of the seven million acres, as far west as the sovereignty of the United States extends.

Absolute as the guarantee of possession of the lands described in these two treaties seems to be, it is not a grant in either case of a *fee-simple title*. And in view of the well-known tenure by which the Indians were accustomed to hold their lands from the earliest periods of their history, the guarantee therein given can only be held
35 to be a pledge by the United States that they should be allowed to occupy the lands and use them after their nomadic fashion as long as they saw fit to remain upon them. If any members of a tribe should abandon the lands and conclude to reside

elsewhere those leaving would carry no title to the land along with them; their right to the enjoyment of the land being dependent upon their remaining upon it. And the condition contained in the patent (copied from the act of 28th of May, 1830), "that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same," seems to be conceived with reference to this quality of the title granted. But by the treaty of 1835 the United States in consideration of $500,000 agreed to convey *in fee-simple* by patent, a further tract of land estimated to contain 800,000 acres. This was the only support of the *fee-simple estate* claim. The patent, which comprehends the three parcels of land, amounting to more than fourteen millions of acres, although reciting that it was provided in the treaty of 1835 that a patent should issue in *fee-simple* for this third tract of 800,000 acres, yet uses no such language in the habendum clause, but only declares the United States have given and granted and do give and grant all the said lands "to the Cherokee Nation forever," without any words of limitation.

But it appears from the papers in the case that the third tract of 800,000 acres to which the *fee-simple title*, according to the treaty of 1835, was to attach, has been sold by the Cherokee Nation with the assent of the United States; and so there now remains no land in the Cherokee possession under fee-simple title. Their possession as tenants by occupancy is guaranteed to them forever, but it
36 must be held still to partake somewhat of the old nomadic style of possession. According to the accounts of the early settlers, as stated in Hildreth's History of the United States, vol. 1, pp. 56–60. "The hunting grounds and territory of the Indians appertained not to the chiefs nor to the individuals, but to the tribes or confederacy. The habits of almost all the tribes were more or less mig-atory. They knew little or nothing of the comforts of a settled habitation. They seemed always uneasy; always on the point of going somewhere else."

Of course, the conditions now existing with respect to these interesting people are vastly different from those ascribed to their ancestors by contemporaneous observers and assumed by the Supreme Court in its earlier decisions to be still existing. The courts now, in common with the intelligent people of the land, recognize the increasing intelligence of a people steadily advancing towards an equality of enlightenment with their fellow-citizens of the Republic, who observe their progress with sincere satisfaction.

As the supposed difference in the tenure of the lands of the Cherokee Nation from that of the other tribes, is the only reason assigned by the complainants for exempting them from the effect of the numerous decisions of the Supreme Court recognizing the constitutionality of the various acts of Congress, which have been assailed from time to time by several of the Indian tribes and their members, as unjust intrusions upon their rights, there seems no reason why the Cherokee Nation should not stand with the other civilized Indian tribes as controlled by the clearly expressed
37 provisions of the act of Congress now under examination.

If that act is to control with respect to the other five civilized Indian tribes, it is equally efficacious against the Cherokees.

Indeed the point seems scarcely involved in any doubt since the decision in Stephens *v.* The Cherokee Nation 174 U. S. p. 489. There the Supreme Court examined the question as to the act of 28th June 1898, although it was passed after the judgments there under examination had been rendered, stating that the inference was not unreasonable that a principal object intended to be secured by an appeal was the testing of the constitutionality of that act. It recognizes the act as sweeping and comprehensive, and comments upon many of its sections; and refers to the elaborate opinions of Judge Springer and the other judges of the Indian Territory, which consider the subject in all its aspects; including the various treaties, tribal constitutions and laws &c.; and concludes by declaring that the Supreme Court holds the entire legislation constitutional.

In the face of such a judgment, rendered in a cause in which the Cherokee Nation itself was the party complainant, it seems needless to add another word. Indeed nothing but the zeal and ability with which the contrary view was presented before me by the complainants' counsel, could have justified the court in prolonging the discussion as far as I have done.

It is needless also to notice the other points presented by the counsel for the United States with much ability, for an examination of those questions would involve merely a repetition of the various questions, in the language of the highest of the courts.

38 I shall pass a decree sustaining the demurrer of the United States and dismissing the bill.

A. B. HAGNER,
Associate Justice.

Memorandum.

May 19, 1902.—$100 deposited by appellants in lieu of appeal bond.

39 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 38, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia in cause No. 22712, equity, wherein the Cherokee Nation *et al.* are complainants, and Ethan A. Hitchcock, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19 day of May, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

40 [Endorsed:] District of Columbia supreme court. No. 1221. The Cherokee Nation *et al.* appellants, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Court of Appeals, District of Columbia. Filed May 19, 1902. Robert Willett, clerk.

41 In the Court of Appeals of the District of Columbia.

THE CHEROKEE NATION ET AL., Appellants, *vs.* ETHAN A. HITCHCOCK, Appellee. } No. 1221.

At the special instance of the appellants it is stipulated and agreed between the respective parties to the above cause that the contention of the appellee herein is largely along the line of that which was sustained by the decision of this court in the case of Lone Wolf *et al. v.* Ethan A. Hitchcock *et al.*, that therefore with the consent of the court the record herein need not be printed, and a decree in affirmance of the decree of the court below may be entered herein without argument, such submission, however, not to affect the right of the appellants herein to take a further appeal to the Supreme Court of the United States.

WM. M. SPRINGER,
Solicitor for Appellants.
WILLIS VAN DEVANTER,
Solicitor for Appellee.

(Endorsed:) No. 1221. In the Court of Appeals of the District of Columbia. The Cherokee Nation *et al.*, appellants, *v.* Ethan A. Hitchcock, appellee. Stipulation. Court of Appeals, District of Columbia. Filed May 20, 1902. Robert Willett, clerk.

42 In the Court of Appeals of the District of Columbia.

THE CHEROKEE NATION ET AL., Appellants, *vs.* ETHAN A. HITCHCOCK, Appellee. } No. 1221.

Now come here the appellants and move the court that the printing of the record in this case be dispensed with, and that the case be submitted to the court without argument, and for cause thereof show to the court the stipulation, this day filed, between counsel for the respective parties.

WM. M. SPRINGER,
Solicitor for Appellants.

(Endorsed:) No. 1221. Court of Appeals, D. C. April term, 1902. The Cherokee Nation, *et al.*, appellants, *vs.* Ethan A. Hitchcock. Motion to dispense with printing record. Court of Appeals, District of Columbia. Filed May 20, 1902. Robert Willett, clerk.

TUESDAY, *May 20th, A. D.* 1902.

THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph H. La Hay, *et al.*, Appellants, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1221.

On motion of counsel for the appellants, it is ordered by the court that the printing of the record in the above-entitled cause be dispensed with, as per stipulation of counsel: Whereupon this cause was submitted to the consideration of the court on the transcript of record filed herein.

43 THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Appellants, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1221.

For the reasons stated in the opinion of this court in the case of Lone Wolf, *et al.*, *vs.* Ethan A. Hitchcock, *et al.*, decided at the January term, 1902, and upon the stipulation of the parties, filed in this cause, the order of the court below from which the present appeal is taken, is affirmed.

(Endorsed:) No. 1221. The Cherokee Nation, *et al.*, appellants, *vs.* Ethan A. Hitchcock, Sec'y of the Interior. Opinion *per curiam*. Court of Appeals, District of Columbia. Filed May 21, 1902. Robert Willett, clerk.

44 WEDNESDAY, *May 21st, A. D.* 1902.

THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Appellants, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1221. April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

May 21, 1902.

THE CHEROKEE NATION and THOMAS M. BUFFINGTON, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, Who Sue as Well for Themselves as for All Other Citizens of the Cherokee Nation of Indians Residing in the Indian Territory, Appellants,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1221.

On motion of Mr. Wm. M. Springer of counsel for the appellants in the above entitled cause, it is ordered by the court that said appellants be, and they are hereby, allowed an appeal to the Supreme Court of the United States. And it is further ordered that said appellants deposit with the clerk the sum of one hundred dollars for costs, in lieu of bond.

Memorandum.

May 27, 1902.—$100 deposited for costs in lieu of bond.

45 UNITED STATES OF AMERICA, *ss:*

To Ethan A. Hitchcock, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Cherokee Nation, and Thomas M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, who sue as well for themselves as for all other citizens of the Cherokee Nation of Indians residing in the Indian Territory,—appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 27th day of May, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 28, 1902.
WILLIS VAN DEVANTER,
Assistant Attorney General.

46 [Endorsed:] Court of Appeals, District of Columbia. Filed May 28 1902 Robert Willett clerk

47 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of The Cherokee Nation, and Thomas M.

Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, who sue as well for themselves as for all other citizens of the Cherokee Nation of Indians residing in the Indian Territory, appellants, *vs.* Ethan A. Hitchcock, Secretary of the Interior, No. 1221, April term, 1902, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of May, A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. —. District of Columbia Court of Appeals. Term No. —. The Cherokee Nation, and Thomas M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, who sue as well for themselves as for all other citizens of the Cherokee Nation of Indians residing in the Indian Territory, appellants, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Filed —— —, 190–.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 340.

THE CHEROKEE NATION, *et al.*, *Appellants*,

v.

ETHAN A. HITCHCOCK, Secretary of the Interior.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

On the 23d day of October, 1901, the Appellants filed in the Supreme Court of the District of Columbia, their petition in substance, as follows:

1. That the Cherokee Nation is a body politic whose existence as such has been recognized by the Government of the United States from the foundation of the Government until this time; that Thomas M. Buffington, one of the complainants, is the Principal Chief of the Nation, and that the other Appellants named were citizens of that Nation.

2. That the Respondent, Ethan A. Hitchcock, is a citizen of the United States, residing in the District of Columbia, and is the Secretary of the Interior.

3. That by a treaty between the United States and the

Cherokee Nation west of the Mississippi river, dated May 6, 1828, the United States agreed "to possess the Cherokees and to grant it to them forever," seven millions of acres of land, the boundaries of which are stated therein, and in addition thereto, a perpetual outlet west as far as the jurisdiction of the United States extends.

4. That by article one of a treaty between the United States and said Nation, dated February 14, 1833, the guaranties of the former treaty of 1828, were renewed, with the promise that "letters patent shall be issued by the United States as soon as practicable for the lands hereby granted."

5. That by article 2 of a treaty of December 29, 1835, between said parties, said treaties were referred to and again affirmed.

6. That by article 3 of the treaty of 1835, it was agreed that the lands mentioned in said article and those ceded in 1833 should be included in one patent executed to the Cherokee Nation.

7. That by a patent dated December 31, 1838, the lands granted in said treaties were conveyed to the Cherokee Nation, "to have and hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation, *forever*."

There was an exception to the effect that the lands "shall revert to the United States if the said Cherokee Nation becomes extinct, or abandons the same." There was also another exception which is of no importance at this time.

8. That by said treaties and patent the Cherokee Nation became the owner in fee simple of the lands so granted and conveyed, without any right or reversion unless the Nation should become extinct, or abandon the same, neither of which contingencies has happened.

9. That during the 64 years which have elapsed since said patent was executed and delivered its provisions have been recognized and observed by all the officials of the Government of the United States; that the Cherokee Nation has never by any act of its National Council or otherwise agreed to relinquish to the United States its right and the right of its citizens to the exclusive use, control, and occupation of any of the seven million acres of its lands, upon which the Cherokee people now reside, nor has the Nation ever authorized the United States or any of its officers to grant to persons or corporations, not citizens of the Cherokee Nation, the right to use or occupy any of the lands of the Nation for the purpose of cultivation, mining, or for any other purpose whatever.

10. That numerous applications have been made to the Secretary of the Interior, by persons who are not citizens of the Cherokee Nation, for leases of the lands of said Nation for the purpose of mining for oil, gas, coal, and other minerals; that among such applications is that of a corporation known as the Cherokee Oil and Gas Company, organized under the laws of Arkansas; that said application for a lease covers about 94,000 acres of land belonging to the Cherokee Nation, and now occupied by citizens of the Nation.

11. That the lands in the Cherokee Nation will, in the near future, be allotted to the citizens thereof, each of whom will be entitled to his proportionate share of said lands; that it is the desire of said citizens to take their respective allotments free from any encumbrance whatever, and especially free from any mining claims or leases upon such lands; that under said treaties and the patent from the United States said lands are the sole and exclusive property of the Cherokee Nation, which holds them in trust for all the members of the tribe; that the

"improvements made thereon, and in possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them," as provided in section 2 of article 1 of the Constitution of the Cherokee Nation; that numerous citizens of said Nation are now in possession of the lands embraced in said application and have made improvements thereon, which are their exclusive property.

12. Petitioners are informed that Respondent is giving favorable consideration to said application to the extent of a lease or leases upon eighteen sections, or upon 11,520 acres of said land, for the purpose of mining for oil and gas thereon, for the period of fifteen years; and petitioners are informed that Respondent is about to grant said application to said extent and for said purposes and time, and is thereby threatening to deprive petitioners and the other members of the Cherokee Nation of Indians of their right to the exclusive use and occupation of said lands; and unless restrained by this honorable Court, Respondent will cause irreparable injury, wrong and oppression to, and deprivation of, the property rights of petitioners and all other citizens of said Nation; that said lands are of great value, to wit, of the value of ten dollars an acre at least, and that said lands are believed to contain coal, oil or petroleum to a very large amount.

13. A prayer for injunction restraining Respondent and his counselors, attorneys, solicitors and agents, and all officials, clerks, agents or employees of the United States acting under his orders and instructions, from proceeding further in the matter of granting said application or any part thereof for mining leases on said lands; or in the matter of considering, hearing or granting any other application that may have been made, or may here-

after be made, for mining leases on land in said Nation, by any person or persons whomsoever; and for such other and further relief as the nature of the case and equity and good conscience may require.

14, 15, 16 and 17. Prayer for perpetual injunction and a temporary injunction, submitting interrogatories to Respondent, and for process.

Exhibit No. 1 (Record pp. 9, 10, 11, 12 and 13) contains the text of the patent from the United States to the Cherokee Nation, which embraces the lands in question in this case, which patent is signed by Martin Van Buren, President of the United States, and is dated December 31, 1838.

On the 1st day of November, 1901, Respondent filed his demurrer to said bill of complaint, giving as grounds therefor, that said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or any relief; and that the court had no jurisdiction over the subject-matter of the suit, and that there was a defect of parties.

Reasons for said demurrer were submitted as follows:

1. That the matters named in said bill are matters of administration which cannot be taken away from an executive department, or carried into the courts.

2. That the Cherokee Oil and Gas Company was a necessary party to the suit.

3. That defendant was proceeding in accordance with the act of Congress of June 28, 1898 (30 Stats. 495), which it was claimed, was a valid exercise of the power of Congress over the property of said Indian tribe.

On the 6th day of May, 1902, Mr. Justice Hagner, of the Supreme Court of the District of Columbia, sustained said demurrer, and complainants electing to stand on their said bill of complaint, the same was dismissed. Where-

upon complainants took an appeal to the Court of Appeals of the District of Columbia.

On the 7th day of May, 1902, Mr. Justice Hagner, filed in said Court his opinion, giving his reasons for sustaining said demurrer (Record, pages 16, 17, 18, 19, 20, and 21).

On the 21st day of May, 1902, the Court of Appeals, by Chief Justice Alvey, affirmed the decision of the Supreme Court of the District of Columbia in said suit, and allowed an appeal to this Court. No opinion was filed (Record, page 23).

Brief and Argument.

First. It was agreed in the Court below between counsel for both parties in this case that the contention of the parties herein is largely along the lines of the matters involved in the case of Lone Wolf *et al. v.* Ethan A. Hitchcock *et al.*, No. 275, now pending in this Court, and set down for argument October 20, 1902.

Counsel for appellants therefore, with permission of the Court, file herewith the brief and argument submitted in that case, as a part of their brief and argument in the case at bar.

Appellee's Contention.

Second. Counsel for Appellee in the case at bar contends that section 13, of the Act of Congress of June 28, 1898 (30 U. S. Stats., page 455) confers authority upon the Secretary of the Interior to lease the lands of appellants for mining purposes, without their consent, and that such statute is a valid enactment.

Appellants' Contention.

Third. Counsel for Appellants contend that the act aforesaid does not in terms authorize such leases to be made; but conceding for the sake of argument that a fair construction of the said statute does authorize the Secretary of the Interior to lease Appellants' lands, without their consent for mining purposes, appellants deny the right and power of Congress to pass such a law; and cite the numerous treaties between the United States and the Cherokee Nation and the patent issued to the nation (Record, pages 9 to 13 inclusive) to sustain this contention.

A Part of the Fee.

Fourth. Coal, asphalt, oil and gas, and other minerals in place are a part of the realty, and a lease of land for mining purposes is a disposition of a part of the fee.

While it has not in general been the policy or practice of the United States to convey the absolute title to land upon which it has located Indian tribes to such Indians while they sustain their tribal relations, a contrary policy has been adopted in reference to the Five Civilized Tribes in the Indian Territory, which have received from the United States grants and patents conveying to them their lands in fee simple, subject only to the proviso that such lands shall revert to the United States if the Indians become extinct or abandon the same.

16 Am. and Eng. Encyc. of Law, Second Edition, page 231.

"By section 3 of the Act of May 28, 1830 (4 Stat. at L. 411), providing for the exchange of lands with the Indians, residing in any of the States or Territories, and for their removal west of the Mississippi river, it was pro-

vided that in the making of any such exchange it should be lawful for the President solemnly to assure the tribe or nation with which the exchange was made that the United States would forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and, if they should prefer it, would cause a patent or grant to be executed to them for the same, provided that such lands should revert to the United States if the Indians became extinct or abandoned them. See the following treaties: With the Creeks, March 24, 1832, 7 Stat. at L. 366; February 14, 1833, 7 Stat. at L. 417. With the Cherokees, February 14, 1833, 7 Stat. at L. 414; December 29, 1835, 7 Stat. at L. 478. With the Chickasaws, May 24, 1834, 7 Stat. at L. 450; June 22, 1855, 11 Stat. at L. 611. With the Choctaws, September 27, 1830, 7 Stat. at L. 333; June 22, 1855, 11 Stat. at L. 611. With the Seminoles, May 9, 1832, 7 Stat. at L. 368; March 28, 1833, 7 Stat. at L. 423.

"Cherokee Nation.—Under the patent of December 31, 1838, the Cherokee Nation acquired a fee-simple title to their land, subject to the possibility of reversion to the United States should the nation become extinct or abandon the land. Holden *v.* Joy, 17 Wall. (U. S.) 211; U. S. *v.* Reese, 5 Dill. (U. S.) 405; U. S. *v.* Rogers, 23 Fed. Rep. 658; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641; Cherokee Strip Live Stock Assoc. *v.* Cass Land, etc., Co., 138 Mo. 394."

See Note 3 to text above quoted from 16 Am. and Eng. Encyc. of Law, Second Edition, page 231.

Mineral Locations on Indian Lands Void.

A properly constituted Indian reservation such as that occupied by Appellants is not public land of the United States until the Indian title is extinguished with their consent, and a mineral location thereon is void.

20 Am. and Eng. Encyc. of Law, Second Edition, page 690 and Note 2 on the text, citing Kendall *v.*

San Juan Silver Min. Co., 144 U. S. 658, affirming 9 Colo. 349; McFadden *v.* Mountain View Min., etc., Co. (C. C. A.) 97 Fed. Rep. 670; Golden Terra Min. Co. *v.* Mahler, 4 Mor. Min. Rep. 390.

OPINION OF MR. JUSTICE HAGNER.

Fifth. The opinion of Mr. Justice Hagner, of the Supreme Court of the District of Columbia in the case at bar was handed down after the Lone Wolf case had been decided by the Court of Appeals. His opinion followed the lines laid down in the opinion of the District Court of Appeals, to which reference has been made in the brief and argument in the Lone Wolf case. It is not necessary to restate the points submitted in that brief, as it is now before this court.

Counsel for Appellants, however, insist that due weight was not given to the Cherokee patent by the learned Justice of the Supreme Court of the District of Columbia. While the patent could not convey any greater title than the treaties had authorized to be granted, yet its insurance was a recognition by the Executive Department of the Government of the validity of the grant, of the identical land conveyed, and of the fact that the title had passed out of the United States and into the Nation; and that thereafter the Nation was to have and to hold the land embraced therein, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation, *forever.*" The patent is an official muniment of title.

Counsel for Appellants insist that the Cherokee patent does place the Cherokee title and possession of their lands upon higher grounds than would be the case if no patent had ever issued. This patent was issued sixty-

four years ago. Its validity has never been drawn in question or disputed, until since the passage of the Act of Congress of June 28, 1898. That patent meant just what its terms imported. The Cherokees were to have and to hold said lands, together with all the rights, privileges and appurtenances thereunto belonging, *forever*, unless they abandoned them, or ceased to be a nation. These contingencies have never happened. The Cherokees insist that the Respondent is about to deprive them in part of the rights, privileges and appurtenances belonging to a part of their lands, and they have appealed to this Court to protect them in the enjoyment of their rights and privileges.

Appellants call attention to the further fact that they have been in the undisputed and exclusive possession of the lands embraced in said patent, ever since its execution, now nearly three-quarters of a century. When persons have been in undisputed and peaceable possession of real or personal property for thirty years it is too late to question the validity of the title. In the case of Trustees of the Episcopal Church in Newbern *v.* Trustees of Newbern Academy (2 Hawks. 233), it was held that where there had been a possession of thirty-five years, under a legislative grant, it was held conclusive evidence of good title, although the grant was unconstitutional. (1 Greenlief on Ev., Sect. 21 and Note 5.)

The Law of Estoppel.

Sixth. While the doctrine of estoppel does not usually apply to the State, yet when the State has executed a deed and under that deed property rights have grown up and been recognized, and persons, acting on the truth of the recitals in such deed have made expenditures and incurred

liabilities, the doctrine of estoppel applies against the State as well as it does against individuals. See 11 Am. & Eng. Encyc. of Law, Second Edition, page 396, and note 8, citing People *v.* Society, etc. (2 Paine (U. S.) 545; Carver *v.* Jackson, 4 Pet. 87; Menard *v.* Massey, 8 How. 313, and State decision in Alabama, California, Louisiana, Massachusetts, Minnesota, Missouri, New York, and Pennsylvania.

THE SETTLED DOCTRINE OF THE COURT.

Seventh. It has become the settled policy of this court that where a person has made his solemn deed, he may be estopped, not only from disputing the deed itself, but the facts it recited. It may be stated generally that recitals in deeds of matters which are particular and essential will bind the parties thereto, and their privies in blood, in estate, and in law. See 11 Am. & Eng. Encyc. of Law, Second Edition, page 400, and numerous cases cited in notes 6 and 7.

In Fort *v.* Allen, 110 N. Car., 191, the court said: "Where it is the intent of the parties to place the existence of a fact beyond question, or to make it the basis of the contract, the recital will be effectual, and neither party will be permitted to deny it."

See also: The Town of Coloma *v.* Evans, 92 U. S. 484; Town of Venice *v.* Murdock, *id.*, 494; Converse *v.* City of Fort Scott, *id.*, 503; Marcy *v.* Township of Oswego, *id.*, 637; Commissioners of Douglas County *v.* Bolles, 94 U. S. 104; Commissioners of Johnson County *v.* January, *id.*, 202; Buchanan *v.* Litchfield, 102 U. S. 278; School District *v.* Stone, 106 U. S. 186.

The Act of May 28, 1830.

Eighth. One of the recitals in the Cherokee patent (Record, page 10) is to the effect that all the lands ceded by the treaty of February 14, 1833 (which included the land in question in the case at bar), including the Outlet, and those ceded by that treaty "shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830." The substance of those provisions is set forth in the fourth paragraph of this brief. This act was, therefore, a part of the patent, and it authorized the President solemnly to assure the Cherokees "that the United States would forever secure and guarantee to them and their heirs or successors the country so exchanged with them." The only exception was that the lands should revert to the United States if the Indians became extinct or abandoned them.

The word "revert" has a definite meaning. As used in the above exception, it means that the lands shall "go back" to the United States, if they are abandoned or if the tribe ceases to exist. How could they "go back" if the title had never gone out of the United States?

The courts below now hold in effect that this solemn guarantee and the patent granted by the United States do not create any "difference in the tenure of the lands of the Cherokee Nation from that of the other tribes" (Record, page 20), which was stated to be that the Indians "have no title to the lands they occupy," and that "their right is simply to occupy at the will of the Government and under its protection." (Record, pp. 17 and 18.)

It is not possible by any admitted rules of construction of contracts or treaties to give to the Cherokee patent the meaning which the courts below have placed upon it.

The language of the recitals in the patent is not only free from any ambiguity, but it is plain and unmistakable.

This court, speaking through Mr. Justice Harlan, in the case of the United States *v.* The Choctaw Nation, referring to the construction of treaties with Indian tribes, held as follows:

"What was said in the *Amiable Isabella* (6 Wheat. 1, 71, 72), is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: 'In the first place, this court does not possess any treaty-making power. That power belongs, by the Constitution, to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power and not an exercise of judicial functions. It would be to make and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any motion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model part of the treaty, equally give the rule to the judicial tribunals."

See United States *v.* Choctaw Nation, *et al.* 179 U. S. 494.

This Court will have no difficulty in finding out the intention of the "contracting parties" to the Cherokee treaties and the Cherokee patent, and having found that it will be its duty, and it is bound, as this Court holds, to give effect to the stipulations of the treaty, "*in the manner and to the extent which the parties have declared, and not otherwise.*" Hence we do not apprehend that this Court will hold that the language of the Cherokee patent, "to have and to hold, together with all the rights, privileges and appurtenances thereto belonging, forever," means "to have and to hold at the will of the United States, and with only such rights, privileges and appurtenaces as Congress may, from time to time, permit."

Constitution in Force in Indian Territory.

Ninth. It was provided in Section 31 of the Act of Congress of May 2, 1890, to organize a temporary government for Oklahoma, and to enlarge the jurisdiction of the United States Court in the Indian Territory, that: "The Constitution of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States."

In the case of Downes *v.* Bidwell, one of the Porto Rico cases recently decided by this Court, it was held: "That where the Constitution has been once formally extended by Congress to Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith."

The Constitution provides that: "No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Amendment, Article 5.)

The Cherokee Nation holds the lands in question for the benefit of the Cherokee people. Can they be deprived of its use without their consent, except by due process of law?

CHEROKEE INDIANS ARE CITIZENS OF THE UNITED STATES.

Tenth. Congress passed an Act of March 3, 1901, which made every Indian in the Indian Territory a citizen of the United States, with all the rights, privileges and immunities of other citizens thereof. (31 U. S. Stats., p. 1447.)

NO LONGER WARDS OR INCOMPETENTS.

Eleventh. The contention so often put forth that Indians are the dependent wards of the Nation and that Congress may, by reason of this fact, dispose of them and their lands as it, in its wisdom, may see fit, will not avail as to the Cherokees. They are now citizens of the United States, having all the rights, privileges and immunities of other citizens, and their property is as sacred in the eyes of the law and their titles are as unassailable as if they were citizens of Massachusetts and descendants of the Pilgrim fathers. They hold their lands, as already pointed out in this brief, not only by solemn treaty provisions with the United States, but by a patent which has been recognized as valid and binding upon the United States, by all the departments of the Government, for nearly three-quarters of a century. It is now too late for Congress, or for any of the departments of the Government to disregard their right to the exclusive use and occupation of their lands until they voluntarily relinquish them.

FACTS ADMITTED.

Twelfth. As the case at bar was disposed of in the courts below on demurrer, all facts alleged in the Bill of Complaint properly pleaded are admitted. It is stated in said Bill of Complaint (Record, page 5):

"That the Cherokee Nation has never, by any act of its national council or otherwise, agreed to relinquish to the United States its right and the right of its citizens to the exclusive use, control and occupancy of any of the seven millions of acres of its lands, upon which the Cherokee people now reside, nor has said nation ever agreed to authorize any officer or department of the United States to grant persons or corporations, not citizens of the Cherokee Nation, the right to use, or occupy any of the lands of the nation for the purpose of cultivation, mining or for any other purpose whatever, except in some instances for the right of way for railroad corporations."

This fact is properly pleaded and it is admitted by the demurrer.

It is also admitted by the demurrer that the Respondent is considering an application for a lease upon a portion of their said lands to the extent of 11,500 acres for the purpose of mining for oil and gas thereon, for a period of 15 years; and that he is about to grant said application to that extent and for that purpose and time; and said Respondent is about to execute a lease or leases upon all or a part of said land to persons not citizens of the Cherokee Nation. (Record, pages 5 and 6.) And it is for the purpose of preventing the execution of such leases, or any leases whatever upon the lands of the Cherokee Nation, that an injunction is prayed in this case.

In view of the elaborate brief and argument in the Lone Wolf case, which applies in nearly all respects to

the case at bar, a further brief in this case is deemed unnecessary.

In Conclusion.

Counsel for Appellants respectfully submits:

First. That the Cherokee Indians are no longer the dependent wards of the United States; but that they are citizens, entitled to all the rights, privileges and immunities of other citizens of the United States.

Second. That the right of the United States to dispose of, interfere with, or to control in any way, the lands of the Cherokee Nation, is limited to the express, or necessarily implied, conditions of the contract of purchase of such lands.

Third. The contract by which the Cherokee Nation holds its lands is to be found only in the treaties, which the nation has made with the United States, and in the patent to such lands, which the United States has executed and delivered to the nation. That said patent was issued and delivered sixty-four years ago; that said Indians have occupied said lands from that time to the present, and that the right to the exclusive use and occupation of said lands by the Cherokee people has been recognized by all the Departments of the Government of the United States from that time to the present; and that Congress cannot, if it would, deprive the Cherokee people of such right, without their consent, except by the due process of law.

Fourth. That the Cherokee Nation has never, directly or by implication, given its consent to the leasing of any of its lands by the United States for mining purposes.

Fifth. That the citizens of the Nation who have made, or who are rightfully in possession of the improvements on the lands of the Cherokee Nation, have the right to the

exclusive use and occupation of the lands upon which improvements have been made, and that Congress has no right or power to deprive them of such right without their consent and the consent of the Nation.

Counsel for Appellants, therefore, respectfully insists that the judgment of the court below should be reversed and the cause remanded with directions to overrule the demurrer, and to issue an injunction, restraining the Respondent from granting the application of the said Cherokee Oil and Gas Company, and the applications of all other persons, for leases of any kind upon any of said lands, except in pursuance of the provisions of an agreement between the Nation and the United States. And counsel for Appellants insists that no such agreement has ever been made, and that no concurrence of action whatever has ever taken place between the Nation and the United States that would authorize the Secretary of the Interior to grant the application of the Cherokee Oil and Gas Company, or any other application for a lease or leases upon any of said lands.

Respectfully submitted.

WILLIAM M. SPRINGER,
Solicitor for Appellants.

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Office Supreme Court U.S.
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OCT 20 1902
JAMES H. McKENNEY,
Clerk

No. 340.

Br. of Atty. Gen. [illegible]
for Appellees.

Filed Oct. 20, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE CHEROKEE NATION ET AL., APPELLANTS,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR. } No. 340.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE CHEROKEE NATION AND THOMAS M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, who sue as well for themselves as for all other citizens of the Cherokee Nation of Indians residing in the Indian Territory, appellants,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR. } No. 340.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT AND INTRODUCTION.

This suit was brought in the supreme court of the District of Columbia to restrain the Secretary of the Interior from leasing any lands of the Cherokee Nation for mining purposes. It is alleged in the bill of complaint that the Cherokee Nation is a body politic, recognized as such by the United States from the foundation of the Government; that complainant Buffington is the principal chief of said nation; that

complainant La Hay is the treasurer thereof, and that the other complainants are citizens of said nation. It is further alleged that by certain treaties, specifically named, between the United States and the Cherokee Nation and a certain patent issued thereunder, the said Cherokee Nation became the owner in fee of the lands described therein without any right of reversion, unless the nation should become extinct or abandon said lands. It is further alleged that numerous applications have been made to the respondent, as Secretary of the Interior, by persons not citizens of the Cherokee Nation, for leases upon lands belonging to said nation, for the purpose of mining oil, gas, coal, and other minerals, among which applications is one by a corporation known as the Cherokee Oil and Gas Company, claiming to be organized under the laws of the State of Arkansas, for a lease upon about 94,000 acres of land now occupied by citizens of the nation, under the laws and customs of the nation, and used by them for agricultural and grazing purposes. It is alleged, on information and belief, that the respondent, as Secretary of the Interior, is giving favorable consideration to said application and is about to grant it to the extent of 18 sections of land for the purpose of mining oil for a period of fifteen years, thereby threatening to deprive the members of the Cherokee Nation of their right to the exclusive use of said lands, in utter disregard of the provisions of said treaties and patents and the rights of the Cherokee Nation and its members thereunder, and that unless restrained the respondent

will cause irreparable injury, wrong, and oppression to, and deprivation of, the property rights of complainants and all other members of said Cherokee Nation. (Record, pp. 1–13).

To said bill of complaint respondent interposed a demurrer upon the grounds (Record, p. 14):

> 1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or to any relief.
>
> 2. The court has no jurisdiction over the subject-matter of the suit.
>
> 3. There is a defect of parties defendant.

Accompanying said demurrer was a more specific statement, as follows (Record, p. 14):

> Defendants will urge as reasons for demurrer:
>
> 1. That the matters named in the bill are matters of administration, which can not be taken away from an Executive Department and carried into the courts.
>
> 2. That the Cherokee Oil and Gas Company named in the bill is a necessary party to the suit, as shown by the bill.
>
> 3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898 (30 Stat., 495), which is a valid exercise of the power of Congress over the property of an Indian tribe.

The court sustained the demurrer and entered a decree dismissing the bill of complaint (Record, p. 15). The opinion of Mr. Justice Hagner is printed in the record (pp. 16–21). Upon appeal to the court of

appeals of the District of Columbia the decree of the supreme court dismissing the bill was affirmed (Record, p. 23).

From that decree of affirmance the complainants have appealed to this court.

For a satisfactory presentation and clear understanding of the questions involved, it is advisable to refer briefly to Congressional action affecting the Cherokee Nation of a date later than the treaties mentioned in the bill of complaint. These are all public acts of which the courts will take judicial notice.

In addition to the treaties between the United States and the Cherokee Nation, mentioned in the bill of complaint (May 6, 1828, 7 Stat., 311; February 14, 1833, 7 Stat., 414; December 29, 1835, 7 Stat., 478; August 6, 1846, 9 Stat., 871), there was another of July 19, 1866 (14 Stat., 799), which is referred to here only to complete the history of the dealings with the tribe.

Soon after the date of this latter treaty the policy of dealing with the Indian tribes was abandoned and in the act of March 3, 1871 (16 Stat., 544, 566), it was declared:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

This provision was carried into the Revised Statutes of the United States as section 2079.

By a provision in the act of March 3, 1893 (27 Stat., 612, 645), the President was authorized to appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, and the Seminole Nation to procure the extinguishment of the tribal title to any lands in Indian Territory held by any of such nations, either by cession of the same to the United States or by division thereof in severalty among the members of said nations or tribes, respectively, with a view to the ultimate creation of a State or States of the Union to embrace the lands within said Indian Territory. The commission was appointed and entered upon the duties prescribed, and by act of March 2, 1895 (28 Stat., 910, 939), the membership thereof was increased to five.

This Commission, officially designated as the "Commission to the Five Civilized Tribes," but popularly known as the "Dawes Commission," made reports on November 20, 1894, and November 18, 1895, of the condition of affairs in Indian Territory, which reports are referred to and quoted from by this court in the statement of the case in *Stephens* v. *Cherokee Nation* (174 U. S., 445, 451–453). The court there (pp. 447–451) also referred to and quoted from a report of the Senate Committee on the Five Civilized Tribes of May 7, 1894. These various reports are quite pertinent here as showing the inducement for and purpose of subsequent legislation.

By a provision in the act of June 10, 1896 (29 Stat., 321, 339), said Commission was directed to continue the exercise of the authority already conferred upon it, and was invested with further powers in respect of hearing and determining applications for citizenship in said tribes and making rolls of the members thereof.

A provision in the act of June 7, 1897 (30 Stat., 62, 84), directed said commission to continue to exercise all authority theretofore conferred upon it to negotiate with said Five Tribes, and gave further direction respecting the making of rolls of citizenship.

The act of June 28, 1898 (30 Stat., 495), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," contains provisions for the completion of the rolls of citizenship of said tribes, for the reservation of town sites and the sale of lots therein, and for the allotment of the exclusive use and occupancy of the surface of all lands susceptible of allotment among the citizens of the respective tribes with a provision as follows (sec. 11):

> But all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits.

Section 13 of said act contains provisions for leasing the oil, coal, asphalt, and mineral deposits as follows:

> That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals

in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys. Lessees shall pay on each oil, coal, asphalt, or other mineral claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced royalty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be

ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt, or other mineral deposits by lessees or their assigns, which have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improve-

> ments of such lessees; and in all cases of the leasing or renewal of leases of oil, coal, asphalt, and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior.

Section 16 contains a provision as to the payment and distribution of rents and royalties due said tribes, as follows:

> That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong.
> * * *

It is not alleged that the granting of the application referred to and the giving of a lease in accordance therewith are prohibited by said act of June 28, 1898, nor that the respondent proposes to disregard any provision of that law or to take any action otherwise than

in strict conformity therewith. Under these circumstances the citation of that act, showing on its face, as it does, full and complete authority for the alleged proposed action, is perhaps sufficient to sustain the contention that the complainants are not entitled to the relief prayed for or to any relief. Relief could be given only upon the theory that Congress had no power to enact such legislation. The courts are ever reluctant to enter upon an inquiry that involves that question. One who asks a judgment declaring an act of Congress unconstitutional should do it by direct allegation, setting forth specifically and fully the grounds therefor, and not indirectly and by implication only, as is done in the present proceeding.

Inasmuch, however, as the relief prayed for can be given only by finding said act to be void because of conflict with some provision of the Constitution, it is deemed proper to discuss the general powers and duties of Congress in respect of the subject-matter.

THE INDIANS ARE WARDS OF THE UNITED STATES.

The Indian tribes located within the geographical limits of the United States are not recognized as independent sovereign powers or nations, but as dependent communities, subject in all matters relating to their protection, government, civilization, and support to the supervision and control of the United States. In *Cherokee Nation* v. *Georgia* (5 Peters, 1, 17) the status of these same people—the Cherokee Nation—was considered, and Chief Justice Marshall, after concluding that the Indian tribes can not be accurately denomi-

nated as foreign nations, describes their relation to the United States as follows:

> They may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.

The relation the Indians bear to the United States is more fully and definitely stated in *United States* v. *Kagama* (118 U. S., 375, 383), where it is said:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* upon the United States. Dependent largely for their daily food. Dependent for their political rights.
>
> * * * * *
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The rule thus announced has never been modified or questioned by this court, but has been repeated in later decisions, among which may be mentioned *Choctaw Nation* v. *United States* (119 U. S., 1, 22); *Cherokee*

Nation v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653); *Stephens* v. *Cherokee Nation* (174 U. S., 445, 484).

For many years the political branch of the Government accorded to various Indian tribes a certain degree of recognition as independent people, in that treaties were negotiated with them and they were allowed to make laws and regulations in respect of their internal and tribal affairs. This policy was finally abandoned, and that which should thereafter be pursued was declared by the act of March 3, 1871, supra. The authority of Congress to make this change and to control and regulate the affairs of the Indian tribes by direct legislation, has never been seriously questioned and has been recognized by this court in many decisions.

In *United States* v. *Kagama* (*supra*), the court, after referring to cases defining the status of Indian tribes, said (p. 382):

> In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes.

In *Choctaw Nation* v. *United States* (119 U. S., 1, 27), after describing the United States as a sovereign nation subject to no law but the law of nations, it was said:

> On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

In *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 654), the court quoted the excerpt given above from *Choctaw Nation* v. *United States* as the latest utterance upon the general subject of the status of the Indian tribes. In this case, after referring to the treaties with the Cherokee Nation of 1835, 1846, and 1866, as recognizing the Cherokees as a separate and distinct people, and as guaranteeing to them the title and possession of their lands and jurisdiction over their country, it was said:

> But neither these nor any previous treaties evinced any intention upon the part of the Government to discharge them from their condition of pupilage or dependency and constitute them a separate, independent, sovereign people, with no superior within its limits.

The case which is, however, the most pertinent to the present inquiry, because it involved not only the status of the Cherokees, the people complaining here, but

also the validity of the act of June 28, 1898, the execution of which it is sought in this proceeding to prevent, is *Stephens* v. *Cherokee Nation* (174 U. S., 445). That case involved the validity of the act of June 28, 1898, and preceding legislation by which the United States had assumed practically full control over the Cherokee Nation and the others of the Five Civilized Tribes, even to the extent of determining the membership thereof. It was there said (p. 483):

> It is true that the Indian tribes were for many years allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States; and numerous treaties were made by the United States with those tribes as distinct political societies. The policy of the Government, however, in dealing with the Indian nations was definitely expressed in a proviso inserted in the Indian appropriation act of March 3, 1871, c. 120, 16 Stat., 544, 566, to the effect:

After quoting from the act of March 3, 1871, and section 2079, Revised Statutes, and after an extended extract from the decision in *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653), as sufficiently showing the general power of Congress over the Indian tribes, it was said (p. 486):

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plentitude thus indicated,

> we are unable to perceive that the legislation in question is in contravention of the Constitution.

As if to emphasize the assertion as to the plenary power of Congress and to avoid the possibility of any mistake as to the court's position, it was said in another place (p. 488):

> We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

After pointing out that the principal object intended to be secured by allowing an appeal to this court in the case there involved was the testing of the constitutionality of the act of June 28, 1898, and after giving a résumé of its provisions and characterizing them as comprehensive and sweeping in character, it was said:

> For the reasons already given we regard this act in general as not obnoxious to constitutional objection.

It is insisted by appellants that the court in that case had under consideration only that portion of said act of June 28, 1898, referring to citizenship in said nation, and that any statements made as to the general character of the act should not be taken as affirming the constitutionality of the provisions thereof relating to the leasing of mineral deposits. It is not believed that this contention is well made, but even if it be correct the same process of reasoning which led to the conclusion announced as to validity of the provisions of the act directly involved there, would lead to the same conclusion in respect of the provisions directly involved here. If Congress had the power to provide a method for determining applications for membership in said tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe, it certainly had authority to take measures to make that property productive and to secure therefrom an income for the benefit of the tribe.

In the brief on behalf of the Indian appellants in the case of *Lone Wolf et al.* v. *Hitchcock et al.*, filed as a

part of appellants' brief herein, the purpose of Congress to protect the Indians by this act of 1898 is recognized; the necessity for some such action, and the power of Congress to take it seem to be conceded. Speaking of said act in connection with the provisions thereof as to allotments, it is said (p. 73): "The act was an effort on the part of Congress to prevent the monopoly of the land by a few persons and to equalize the landholdings, so as to give every citizen an equal share in the use of the lands of the tribe." With equal propriety it may be said with reference to the provisions in respect of mineral leases: "The act was an effort on the part of Congress to prevent the monopoly of the mineral deposits in the land by a few persons, so as to give every citizen an equal share in the revenues to be derived therefrom."

LEGISLATIVE CONTROL OF THE PROPERTY OF WARDS.

It must be remembered that the land from which mineral may be taken under any lease made under the provision of said act of June 28, 1898, is tribal property, in which no member of the tribe has any individual ownership, and that the mineral to be extracted under any such lease is tribal property.

Further, this case involves no question as to the *taking* of property, but only one relating to the control and development in the direction of increased productiveness of the property of the tribe, a ward of the United States. This tribe or nation of Indian wards is within one of the Territories of the United States over which Congress has exclusive sovereignty, and sole and

full power of legislation. In *National Bank* v. *County of Yankton* (101 U. S., 129, 133) this court, after saying that "it is certainly now too late to doubt the power of Congress to govern the Territories," described the relationship of such Territories to the United States and the power of Congress over them and the people residing in them as follows:

> * * * The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.
>
> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other

> words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

This principle has become a well-settled rule, as shown by the many decisions where it has been asserted, among which are: *Murphy* v. *Ramsey* (114 U. S., 15, 44): *Mormon Church* v. *United States* (136 U. S., 1, 43–44): *Utter* v. *Franklin* (172 U. S., 416, 420): *De Lima* v. *Bidwell* (182 U. S., 1, 196), and *Downes* v. *Bidwell* (182 U. S., 244, 267–269).

Looking at the question presented here in the light of the rule thus announced, it will be found that the authority of Congress to enact legislation for the management of the property of these wards of the nation is fully sustained. The management and care of the property of minors, incompetents, and other persons not *sui juris* is one of the subjects which the legislature, within whose jurisdiction such persons reside, may or may not submit to the courts, as it may deem proper. (Cooley's Constitutional Limitations, sixth edition, page 115 *et seq.*)

Legislative control and management of the estates of minors is fully discussed by this court in *Hoyt* v. *Sprague* (103 U. S., 613). The legislature of Rhode Island authorized the investment of the property of certain minors in the shares of a business corporation which afterwards failed, whereby the property of the minors was lost. After attaining their majority they

sought to recover their original property upon the theory that the authorization of the investment was a judicial function, outside the scope of legislative authority. This court held (syllabus) "that in the absence of constitutional restraint the legislature may pass special laws for the sale or investment of the estates of infants or other persons who are not *sui juris*," and in the course of the opinion said (pp. 633, 634):

> * * * As already intimated, it can not be doubted that the legislative power extends to the regulation of the investments and the management of minors' estates by their guardians. The legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading, or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified. Usually, such authority, if given, would be required to be exercised under the allowance and supervision of a court; but that would be a matter of legislative discretion. That such an authority could be conferred by law there can be no doubt. Analogous powers have been conferred from time immemorial.
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> * * * * *
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> The question of the power of a legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occa-

sion. Suffice it to say that laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every State in the Union and have received the sanction not only of this court, but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts the power exercised is of a legislative character, the legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited by the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, we can not deny to the legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

Rice v. *Parkman* (16 Mass., 326) was a case where the property of certain minors had been sold under special act of the legislature authorizing the sale. The children after coming of age brought suit against the party claiming under the sale, insisting that the special statute was void. The supreme court of Massachusetts sustained the statute, and in the course of its opinion said:

> This is a power, frequently exercised by the legislature of this State since the adoption of the Constitution and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed, it seems absolutely necessary for the interest of those who by the general rules of law are incapacitated from disposing of their property that a power should exist somewhere of converting lands into money; for otherwise many minors might suffer, although having property, it not being in condition to yield an income. This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.
>
> It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant and whose structure may enable them more easily to understand the merits of the particular application brought before them; but it does not follow that because

the power has been delegated by the legislature to courts of law it is judicial in its character.

This same question was also considered and decided by the supreme court of Mississippi in *Louisville, etc., Rwy. Co.* v. *Blythe* (30 American State Reports, 599). It was there said (p. 603):

> The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature authorizing or confirming the sale of lands by guardians are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights in the absence of special or exceptional constitutional limitations, and that such acts are not judicial, but the proper exercise of legislative power.
>
> Such a power necessarily resides in the legislative department of the Government, as *parens patriæ*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs.

In *Henderson* v. *Dowd* (116 N. C., 195) it was said:

> This court is of the opinion that the legislature has the power to enact that the plaintiff be appointed guardian, * * * because there is no restriction on such power in the organic law. The policy is not for this court to consider. It is by the authority of the legislature that the duties of the clerk are prescribed and

> regulated, and if that body can delegate the execution of such duties to the clerk, it must have the power to do the same.

In *Davidson* v. *Johannot* (7 Metcalf, 388) it was said:

> The legislature has power to authorize the guardian of a person *non compos mentis* to sell a part of his ward's estate, and apply the proceeds to discharge incumbrances on other parts thereof.

In *Cochran* v. *Van Surlay* (20 Wend., 365) it was said:

> A private act of the legislature authorizing the sale of the estate of infants for their maintenance and education is within the scope of the legitimate authority of a State legislature. * * * It is clearly * * * within the powers of the legislature as *parens patriæ* to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs.

The character and extent of the prerogatives pertaining to the supreme power of a state as *parens patriæ* have been discussed by this court in various cases. In *Wheeler* v. *Smith* (9 How., 55, 77) it was said:

> When this country achieved its independence the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is made known to us

> by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the Crown. The State, as a sovereign, is the *parens patriæ*.

This statement is quoted substantially in *Fontain* v. *Ravenel* (17 How., 369, 384), and again in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States* (136 U. S., 1, 57), where the court adds:

> This prerogative of *parens patriæ* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function and often necessary to be exercised in the interests of humanity and for the prevention of injury to those who can not protect themselves. Lord Chancellor Somers, in *Cary* v. *Bertie* (2 Vernon, 333, 342), said: "It is true infants are always favored. In this court there are several things which belong to the King as *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."
>
> The supreme judicial court of Massachusetts well said, in *Sohier* v. *Mass. Gen. Hospital* (3 Cush., 483, 497): "It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons, and persons not known or not in being who can not act for themselves.

> The best interest of these persons and justice to other persons often require that such sales should be made. It would be attended with incalculable mischiefs, injuries, and losses if estates in which persons are interested who have not capacity to act for themselves, or who can not be certainly ascertained, or are not in being, could under no circumstances be sold and perfect titles effected. But in such cases the legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."
>
> These remarks in reference to infants, insane persons, and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic; but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

This quotation is peculiarly significant here because it is taken from a case where the court declares that sovereignty over the Territories is lodged in Congress.

The Cherokee Indians are clearly of that class of persons whose rights and interests must be protected and controlled by the sovereign authority under whose

jurisdiction they come, as *parens patriæ*. Not only are they living within the geographical limits of the United States, although not within the jurisdiction or subject to the control of any State, but under the control and jurisdiction of the General Government, whose sovereign will is made known by the enactments of the Congress, but they are also living within one of the Territories over which, and the people living therein, Congress has full power of legislation. It is clear that the prerogatives of *parens patriæ* as to these Indians are lodged in Congress. Here whatever claim the Indians have to the land is held by them not as individuals, but as a tribe, the wards of the nation, and it was clearly within the power of Congress to prescribe such measures as might be necessary to make the land yield an income for the benefit of the tribe and the individual members thereof. Each member of the tribe has the same interest in the tribal lands, the proceeds thereof, and the revenue derived therefrom as each other member, and it was not only the right, but the imperative duty of Congress as *parens patriæ* to so control said lands as to make them productive and insure to each member an equal benefit from the resulting income.

The individuals, especially the more ignorant among them, and the minors and orphans, were powerless to effectually assert and maintain their claims or to compel recognition of their right to equitable participation in the common property of the tribe. They could expect vindication of their rights and could look for protection

only from their sovereign authority as *parens patriæ*. If it be true, as said by this court, "that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic, but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right," this is a case where its exercise was most urgently called for. The conditions upon which this statement is predicated are set forth in the reports referred to and quoted from in *Stephens* v. *Cherokee Nation* (174 U. S., 445, 447–453). The Senate Committee on the Five Civilized Tribes of Indians, in the report of May 7, 1894 (Sen. Rep. No. 377, 53d Cong., 2d sess.), said, in part:

> As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.
>
> In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty, and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to

be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust.

The Dawes Commission, in the report of November 18, 1895, said:

> The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

Congress is not merely clothed with the power of protecting these Indian wards, but is *charged* with the *duty* of doing so. *Stephens* v. *Cherokee Nation* (174 U. S., 445, 488); *United States* v. *Kagama* (118 U. S., 375, 384). Nor is this duty one which can be surrendered or contracted away. In *Stone* v. *Mississippi* (101 U. S., 814, 820) it is said:

> But the power of governing is a trust committed by the people to the Government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power, but they can not give away nor sell the discretion of those that

> are to come after them in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

ACT OF MARCH 3, 1901, MAKING CHEROKEES CITIZENS, DOES NOT ALTER POWER OR DUTY OF CONGRESS.

The conferring of citizenship upon the members of the tribe has not changed the relationship of the tribe to the United States, nor does it make the lands other than tribal property. The duty and power of Congress over the tribe and its property are the same now as before the members were made citizens. The Cherokees still constitute an Indian tribe, a dependent community, the relationship to the Government still being that of a ward to the guardian. The principles and rules applicable to Indian tribes generally apply now as forcefully as ever to the Cherokees. The need for the exercise of the authority of Congress is as great now as before. The individual has no greater capacity or ability to secure participation in the common property of the tribe than he had in his former state.

The prerogatives of the Government as *parens patriæ*, which in this country are vested in the sovereign legislative organization, are usually called into activity in respect of citizens of the nation and their property. The fact that these Indians are citizens does not lessen the necessity for the intervention of Congress. To the duty of affording them protection as Indians is added the duty of protecting them as citizens within the exclusive jurisdiction of Congress. That the obligations of the Government toward the Indians are not terminated or discharged by making them citizens has come

to be a recognized rule of decision. Section 6 of the act of February 8, 1887 (24 Stat., 388), declares that Indians who shall take allotments in severalty under that act or any other act or treaty shall be citizens of the United States. The act of March 3, 1901 (31 Stat., 1447), extends that provision to "every Indian in Indian Territory." It is held that Indians who received allotments under the act of 1887, thereby becoming citizens, are not deprived of the care and control of Congress, that the status of citizenship is not incompatible with the status of a tribal Indian or the continued guardianship of the Government. *Eells et al.* v. *Ross* (64 Fed. Rep., 417, 420); *Beck* v. *Flournoy Live Stock, etc., Co.* (65 Fed. Rep., 30, 35); *United States* v. *Flournoy, etc., Co.* (69 Fed. Rep., 886, 891); *Farrell* v. *United States* (110 Fed. Rep., 942); *State* v. *Columbia George* (65 Pac. Rep., 604). In the last case it is said by the supreme court of Oregon (p. 610):

> It would seem, therefore, that citizenship, such as extends within the purview of the Dawes act [act February 8, 1887] to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian: that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greater restricted authority, in their primitive government; and until the General Government has taken its hands off, and relinquished supervision over its Indians, the State court can not assume jurisdiction touching the criminal acts of one against another.

AN ACT OF CONGRESS MAY SUPERSEDE A TREATY.

It is earnestly contended by appellants that the granting of a lease for mining purposes upon any of the lands held by the Cherokee Nation would be a clear violation of the treaty provisions existing between the United States and the Cherokees. As said before, it is not alleged that the Secretary of the Interior proposes to do anything in the premises not authorized by the act of June 28, 1898, and the contention is, therefore, in effect that the provisions of that act relative to the leasing of mineral deposits are in conflict with the provisions of prior treaties.

It is respectfully submitted that there is no real conflict. The act does not contemplate the *taking* of any property of the Indians, but simply provides for the profitable administration of their property for their benefit. The United States did not in any treaty waive its right to control and administer the affairs of the Cherokees (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 655), but, on the other hand, this right was always asserted by the United States, and the ultimate sovereignty of the United States was always recognized by the Indians, and has been frequently invoked for their protection.

But if there be a conflict, the later act must prevail over the prior treaty. This principle has been frequently applied by this court to treaties with foreign nations, as in the *Head Money cases* (112 U. S., 580, 597–599); *Whitney* v. *Robertson* (124 U. S., 190, 194); *Botiller* v. *Dominguez* (130 U. S., 238–247); *The Chinese Exclusion case* (130 U. S., 581, 602); *Horner* v.

United States (143 U. S., 570, 578), and *Barker* v. *Harvey* (181 U. S., 481, 488), and also in many cases involving treaties with Indian tribes.

In *The Cherokee Tobacco* (11 Wall., 616, 620, 621) it was claimed that an act of Congress of July 20, 1868, declaring that the internal-revenue laws should be held to extend to the taxed articles produced anywhere within the exterior boundaries of the United States, did not have operation in the Cherokee Nation because in conflict with the provisions of the treaty of 1866. This court recognized the repugnancy, but held that the earlier treaty must yield to the later law. After citing the cases of *Foster* v. *Neilson* (2 Peters, 314), *Taylor* v. *Morton* (2 Curtis, 454), and *The Clinton Bridge* (1 Walworth, 155) as supporting the general proposition that a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty, it was said:

> It need hardly be said that a treaty can not change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be

> involved and require their faithful observance, can not be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

In *Ward* v. *Race Horse* (163 U. S., 504, 511) it was found that the provisions of the act of Congress admitting Wyoming into the Union were in conflict with the provisions of a prior treaty assuring to the Bannock tribe of Indians the right to hunt upon the unoccupied lands of the United States, and it was held that the act of Congress, being later in date, repealed the provisions of the prior treaty in conflict therewith.

Thomas v. *Gay* (169 U. S., 264, 270–271) involved a question as to the right of the Territory of Oklahoma to collect taxes upon cattle grazed upon lands of the Osage and Kansas Indians. These lands were formerly a part of the Cherokee country, and it was claimed that the inclusion of them within the geographical limits of Oklahoma was in direct violation of treaty provisions. Speaking of this contention the court said:

> Whether, without express stipulation to that effect, the right granted by treaty to the Chero-

> kee Nation, to be exempt, as to their lands, from inclusion within the limits of any Territory or State, passed with the grant of a portion of such lands to the Osage and Kansas Indians, we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890, 26 Stat., 81, creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.
>
> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445) it was contended that this act of June 28, 1898, and other legislation affecting the Cherokee Indians in common with all the Five Civilized Tribes, was invalid, because in conflict with the provisions of prior treaties. In respect to that contention this court said (p. 483):

> The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government." (*Thomas* v. *Gay*, 169 U. S., 264, 271, and cases cited.)

That provision of the act of June 28, 1898, directing the survey and platting of town sites and the appraisal and sale of lots therein under the direction of the Secretary of the Interior was attacked before

the United States court of appeals for Indian Territory in the case of *Tuttle* v. *Moore* (64 Southwestern Reporter, 585). That court very pertinently said:

> It can not be said that the act is unconstitutional, because the Supreme Court of the United States has settled that question in the case of *Stephens* v. *Cherokee Nation*, when they affirmed the judgments in the citizenship cases by declaring, "We hold the entire legislation constitutional."

Because, however, the trial court had apparently held the opinion that Congress had no power to enact the legislation in question there without the consent of the Indians, the court of appeals gave special consideration to that branch of the controversy, and in an able opinion, showing on its face an exhaustive examination of the question and of authorities bearing on it, arrived at the conclusion that Congress had full power to enact the legislation, saying, in conclusion:

> It is too late for these tribal governments or their individual citizens to obstruct and render nugatory the legislation of Congress that has for its object the education and civilization of these Indians and the making of them good and worthy citizens of the United States and their country a rich and prosperous State of the Union. Neither the complaint of the plaintiff nor the petition of the Creek Nation stated a cause of action; neither has this court any jurisdiction of the questions here presented, and the demurrers of the appellants on these grounds should have been sustained.

The line of argument upon which that court reached that conclusion can not be successfully assailed. If Congress has the power to direct the sale of the lands of these Indians it has the power to direct the leasing of the mineral deposits therein for the benefit of the tribe. We respectfully submit that upon principle and under the authorities herein cited it must be held that the provisions of said act of June 28, 1898, relating to the leasing of minerals must prevail as if any provision of any prior treaty in conflict therewith "were not an element to be considered," and that the decisions below must be affirmed.

THE CHEROKEE LANDS ARE TRIBAL OR PUBLIC LANDS AND ARE NOT HELD IN INDIVIDUAL OR PRIVATE OWNERSHIP—THE COURTS HAVE NO JURISDICTION IN RESPECT OF THE POLITICAL FUNCTIONS OF THE GOVERNMENT.

The condition of affairs in the Indian Territory, as set forth in the reports referred to, and quoted from by this court in *Stephens* v. *Cherokee Nation* (*supra*), imperatively demanded that some action be taken to change that condition for the protection of the Indians themselves, and also for the protection of others who, upon the invitation of the various tribes, had invested capital in that country in various enterprises, among them being those for the development of the mineral resources. *Whatever title the Indians have is in the tribe, and not in the individuals*, although held by the tribe for the common use and equal benefit of all the members. (*The Cherokee Trust Funds*, 117 U. S., 288, 308.) The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake* (155 U. S.,

196, 207), where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 488) it is said:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership.

There was no provision by which the lands thus held were to be divided among the members, except in Article XX of the treaty of July 19, 1866 (14 Stat., 799), which reads as follows:

> Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States.

This provision of itself is a recognition of the ultimate sovereignty and control of the United States. While the legislative body of the tribe was permitted a large degree of control over the lands, yet the authority of Congress in the premises was never lost, nor was Congress relieved of the duty of seeing that said land, with the proceeds thereof and revenues derived therefrom, were held for the benefit of or equitably

apportioned to the members of the tribe. When the tribal authorities failed for any reason in the proper administration of the affairs of the tribe, whereby injustice was being done any member, or whereby the property of the tribe or the revenues therefrom were being wasted or perverted into wrong channels, it was the duty of Congress to resume the exercise of the power always residing in it of controlling said property and its use. This was all that was done by the provision of said act of 1898 regarding the leasing of mineral deposits. As shown by the authorities hereinbefore cited (see also appellee's brief in *Lone Wolf et al.* v. *Hitchcock et al.*, No. 275 of the present term), that action was purely political, over which the courts have no jurisdiction. It is not for them to say that the course adopted was not well advised or not calculated to secure the best results. The courts will not inquire as to the advisability of an act of the political branch of the Government acting within the scope of its jurisdiction any more than they will inquire into the motives of the legislature in enacting any specified law. The importance of preserving the division of powers under our system of government is recognized by all authorities upon the subject, and the fact that great evil would necessarily result from the usurpation by one branch of the powers intrusted to another is so plain that elaboration of the proposition is wholly unnecessary. This court, while rightly resisting any attempt upon the part of the legislative or executive branches of the Government to invade its territory, will with equal watchfulness avoid the assumption of control over any of the

functions belonging to either of those branches. We believe it has been clearly shown herein, under the authorities cited, that Congress has not exceeded the authority lodged in it, yet, even if there were doubt as to the validity of the legislation under consideration, that would not be sufficient to justify the courts in declaring it unconstitutional. The doubt must be resolved in favor of the legislative action. (Cooley's Constitutional Limitations, 6th ed., pp. 216–217, and authorities there cited.)

In *Fletcher* v. *Peck* (6 Cranch, 87, 128) Chief Justice Marshall said:

> The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The conclusion reached by Mr. Cooley is stated in the following words (p. 217):

> The constitutionality of a law, then, is to be presumed, because the legislature, which was

first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a coordinate department of the Government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment.

Here, however, there is no occasion or room for presumption. The history of this legislation, as set forth by this court in *Stephens* v. *Cherokee Nation* (174 U. S., 445), shows that the whole matter was carefully investigated and considered by Congress, and that the act under consideration was passed, after due deliberation, with a full knowledge of existing conditions and the importance of the subject-matter, and with full conviction of their authority in the premises. This deliberate conclusion of a coordinate branch of the Government is entitled to and will receive great weight in any examination of the question by the courts.

In such cases the inquiry is limited to the question of power. In *McCulloch* v. *Maryland* (4 Wheaton, 316, 423), after finding that the law there under discussion provided an instrument necessary as a means

to effect legitimate objects of the Government, it was said:

> But were its necessity less apparent none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

In *United States* v. *Des Moines Navigation and Railway Company* (142 U. S., 510, 544) the court quoted with approval a passage from Cooley's Constitutional Limitations as stating the correct rule. It was there said:

> * * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the

navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed., 222) the author, citing several cases, observes: "From what examination has been given to this subject it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

In *Angle* v. *Chicago, St. Paul etc., Railway Co.* (151 U. S., 1, 18), the decision in *Fletcher* v. *Peck*, *supra*, was quoted from, and it was said:

> * * * The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the coordinate departments of the Government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

The rule is again laid down in *Lindsey and Phelps Co.* v. *Mullen* (176 U. S., 126, 146) and in a passage in *Luther* v. *Borden* (7 How., 1, 47), quoted in *Taylor and Marshall* v. *Beckham* (178 U. S., 548, 580), as follows:

> The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not

to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.

The case presented here does not justify the conclusion that Congress has gone beyond its powers. If any injustice has been done by the legislation in question the remedy is not to be found in the courts, but by appeal to the political branch of the Government, which alone is responsible therefor, and which alone has the power to afford any needed relief.

THERE IS A DEFECT OF PARTIES DEFENDANT.

Even if the courts have any jurisdiction over this matter, the bill of complaint here is fatally defective because of the failure to make the Cherokee Oil and Gas Company a party defendant. The bill sets forth specifically that said company has made application for a lease or leases upon land of the Cherokee Nation for mining purposes (Record, p. 5), and it is especially prayed that the defendant be restrained "from proceeding further in the matter of granting the application of the said Cherokee Oil and Gas Company or any part thereof." (Record, p. 7.) This allegation and prayer are sufficient to demonstrate the necessity of making said company a party defendant to this proceeding. A decree in this suit awarding the writ of injunction as prayed might and presumably, from the statements made in the bill of complaint, would injuriously affect the interests of said company without any opportunity being given it to present its claims to the court for consideration. The defendant here has no

interest in this matter beyond that involved in his desire to faithfully administer the law. Upon the face of the bill of complaint said company has an interest which, whether it be large or small, it should be given an opportunity to defend before the court before any adverse action is taken in respect thereof.

By the second proviso to section 11 of the act of June 28, 1898, the rights of lessees or their assigns, who have, under the customs and laws prevailing in Indian Territory, acquired leases and have taken possession of lands and made improvements thereon for the development of oil, coal, asphalt, or other mineral deposits, are recognized and protected to the extent of according such lessees a preference in the making of new leases. The fact that the Cherokee Oil and Gas Company is asserting a claim to recognition under said law is sufficiently brought to the attention of the court by the allegations of the bill of complaint. The extent and character of that claim should be made known to the court before any action is taken which, as would be the result here if a decree be rendered in accordance with the prayer of the bill, adjudicates upon the merits of that claim. The claimant alone can properly present and support its interests, and it is therefore an indispensable party to these proceedings, while the respondent here is a party without real interest in the controversy.

This court in *California* v. *Southern Pacific Company* (157 U. S., 229, 249–251), discussed the question as to attributes which render persons indispensable parties to a suit, and adopted as a correct definition that

given in *Russell* v. *Clarke's Executors* (7 Cranch, 98), and quoted in *Shields* v. *Barrow* (17 How., 130), as follows:

> * * * 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. * * *

The general rule as laid down by a writer of high authority is also quoted with approval, as follows (p. 251):

> Mr. Daniel thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." (1 Dan. Ch. Pl. and Pr., 4th Am. ed., 190.)

The position of the court as pictured there, and the question there asked and answered by the court in the

negative, accurately depict the conditions here, as is seen by the following quotation:

> Sitting as a court of equity, we can not, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?

In the light of the allegations in the bill here the court can not escape the consideration of the question whether the Cherokee Oil and Gas Company is not an indispensable party, and must answer in the negative the question whether the court can proceed to a decree in this suit "and do complete and final justice without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience."

In *New Orleans Water Works* v. *New Orleans* (164 U. S., 471) the complainant claimed, under an act of the general assembly of Louisiana, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi River, and sought to have the court declare void certain ordinances

granting various parties the privilege of laying pipes in the city streets for the purpose of conveying water to their premises from the Mississippi. This court said (p. 480):

> * * * None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River, and if the city does not, within such time, and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of of the plaintiff.
>
> We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. (*Windsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

The question was also presented to and discussed by the United States circuit court of appeals in *Chadbourne's Executors* v. *Coe* (10 U. S. Appeals, 78, 83–84), where numerous authorities are cited.

BILL FALLS SHORT OF STATING CASE FOR EQUITABLE RELIEF BY INJUNCTION.

Even if the courts had jurisdiction over the subject-matter, there would be no good grounds for granting the prayer of the bill of complaint. No injury has been done the Cherokee Nation, and none will result from the action which the complaint alleges is contemplated. The bill does not allege any specific injury, the allegations in respect to injury to be suffered being couched in general, vague, and indefinite terms. As a matter of fact, the provisions of said act of June 28, 1898, as to the leasing of mineral deposits are along the same general lines as those of the Cherokee laws, differing therefrom only in better safeguarding the interests of all parties entitled to be protected. An act of the Cherokee national council of December 6, 1890 (see Article XIX, Compiled Laws of the Cherokee Nation, 1892), declared all minerals discovered in the Cherokee country to be the property of the Cherokee Nation and subject to the control of the national council. It provided that every person, company, or corporation proposing to engage in mining should procure a license from the treasurer of the nation describing the location selected, with a proviso that no lease should exceed 5 miles square; that any citizen having such a license might with the approval of

the national treasurer sublet such lease to any person, company, or corporation whatever; that no license should be granted for a longer period than twenty years, but that any lessee might renew his lease by complying with the laws of the nation; that a sublessee should be subject to all the liabilities and entitled to all the privileges granted to the original lessee; that persons then holding leases might have the same extended for a period of twenty years from the approval of said act by making application to the national treasurer and having his indorsement on the lease to that effect, and fixed the rate of royalty to be paid into the national treasury on the various substances to be mined. It is seen by comparison that the changes made by the act of 1898 are all calculated to better safeguard the interests of the nation, while at the same time affording due protection to those who may have acquired rights under the Cherokee law. In this view of it the act in question contains nothing which can with reason be said to afford any good ground of complaint upon the part of the Cherokee Nation.

Furthermore, the statements of the bill as to the necessity for relief by way of injunction to prevent the multiplicity of suits and irreparable injury to complainants are not sufficient. In *Cruickshank* v. *Bidwell* (176 U. S., 73, 80, 81) this court said:

> It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of

> the law, or that the case falls under some recognized head of equity jurisdiction. *Shelton* v. *Platt*, 139 U. S., 591; *Allen* v. *Pullman's Palace Car Company*, 139 U. S., 658; *Pacific Express Company* v. *Seibert*, 142 U. S., 339; *Pittsburg, etc., Railway Company* v. *Board of Public Works*, 172 U. S., 32; *Arkansas Building and Loan Association* v. *Madden*, 175 U. S., 269. * * *
>
> Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits or the prevention of irreparable injury. The one head is well illustrated by *Union Pacific Railway Company* v. *Cheyenne* (113 U. S., 516), and *Smyth* v. *Ames* (169 U. S., 466, 517), and the other by *Watson* v. *Sutherland* (5 Wall., 74); cited by counsel.
>
> But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.
>
> The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The rule thus laid down that "the mere assertion that the apprehended acts will inflict irreparable injury is not enough" applies with equal aptitude and force to assertions in respect of multiplicity of suits. It is respectfully submitted that the bill of complaint here

does not present facts from which the court may reasonably infer that a refusal to award the writ of injunction would result either in a multiplicity of suits or in irreparable injury to the complainants.

It is asserted that numerous applications have been made to respondent for mining leases upon lands belonging to said nation, but it is not asserted in respect of any such applications, except that of the Cherokee Oil and Gas Company, that it embraces lands in possession of citizens of said nation, or upon which they have made improvements, nor is it alleged that the respondent is giving favorable consideration to or is about to grant any application except that of the Cherokee Oil and Gas Company, or that he is about to execute any such lease for any lands except those included in the application of said company. As to all such alleged applications the statements of the bill are clearly too indefinite to support the claim for relief, and hence they may be eliminated from the discussion. It is asserted that the Cherokee Oil and Gas Company's application is for a lease or leases upon about ninety-four thousand acres, and that numerous citizens are in possession of the lands embraced in said application. This is followed by the statement that the respondent is giving favorable consideration to said application to the extent of a lease or leases upon 18 sections of land, or about 11,520 acres. The court is not informed what number of citizens are upon those lands, nor is there, in fact, a specific allegation that any citizen is thereon. The only

inference to be legitimately drawn from these statements of the bill is that there are only two parties—the Cherokee Nation and the Cherokee Oil and Gas Company—interested in this matter. The facts alleged are not such as justify the inference that a multiplicity of suits may be avoided only by resort to the writ of injunction.

The allegations as to irreparable injury are equally general and insufficient. It is not demonstrated by the facts alleged that any individual citizen of said nation has any interest in any specific tract of land to be covered by the proposed lease that would be injuriously affected by granting such lease. It is asserted, apparently in support of the proposition that the granting of the proposed lease would result in irreparable injury and loss to the citizens of said nation, that the lands of the Cherokees will in the near future be allotted to the citizens of the nation, each of whom will be entitled to his proportionate share thereof. The act of June 28, 1898, contains a provision as follows:

> Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land, by the lessee or party operating the same, before operations begin.

If any individual claim be injuriously affected by any lease, this provision affords a certain and adequate remedy. That act also contains (sec. 11) a provision for allotments. The scheme there provided, however, restricts the allotments to the surface of the lands and specifically excepts therefrom all oil, coal, asphalt, and mineral deposits, they being reserved to the tribe. No individual could acquire any interest under that scheme of allotment that would be injured by a lease of the mineral deposits, except such as are fully protected by the provision, *supra*, for compensation. We respectfully submit that the bill does not present facts which justify the intervention of the courts by means of the writ of injunction.

IN CONCLUSION.

It is urged in behalf of the appellee that the decisions below should be sustained because the act of June 28, 1898, is a valid exercise of the power vested in Congress, and fully authorizes the respondent to do and perform the things which the complainants seek to have him enjoined from doing; because an indispensable party has not been brought into court; because the allegations of the bill of complaint are general and indefinite and do not present facts which entitle the complainants to the relief prayed for or to any relief; and because the things complained of are matters of administration within the jurisdiction of the political

department of the Government and not the subject of judicial cognizance.

Respectfully submitted.

WILLIAM C. POLLOCK,
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Supreme Court of the United States.

No. 340.—October Term, 1902.

The Cherokee Nation et al., Appellants, vs. Ethan A. Hitchcock, Secretary of the Interior.) Appeal from the Court of Appeals of the District of Columbia.

[December 1, 1902.]

This cause was begun on the equity side of the Supreme Court of the District of Columbia. The complainants named in the bill were the Cherokee Nation, and its principal chief and treasurer and sundry other citizens of the nation, suing on behalf of themselves and of citizens of the nation residing in the Indian Territory. Ethan A. Hitchcock, as Secretary of the Interior, was made sole defendant. It was claimed in the bill that, by virtue of certain treaties and a patent based thereon, the Cherokee Nation was vested with a fee simple title to its tribal lands in the Indian Territory, and it was also averred that, by a treaty executed in 1835, there was secured to the nation the right, by its national council, to make and carry into effect all such laws as the Cherokees might deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as had connected themselves with them. A synopsis of the pertinent portions of the treaties above referred to is set out in the margin.*

* By article 2 of the treaty of May 6, 1828, (7 Stat. 311,) the United States, in order to secure to the Cherokee Nation "a permanent home," agreed to "possess the Cherokees, and to guarantee it to them forever," seven million acres of land, within described boundaries, and in addition "guaranteed to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States, and their right of soil extend."

By article 1 of the treaty of February 14, 1833, (7 Stat. 414,) the United States, by a corrected description as to the seven million acres tract, renewed the guaranty as to such tract, the outlet, &c., contained in article 2 of the treaty of 1828, with the reservation respecting use by other Indians of the salt plain if within the limits of the outlet. The article concluded with the statement that "letters patent should be issued by the United States as soon as practicable for the land hereby granted."

By article 2 of the treaty of December 29, 1835, (7 Stat. 478,) after reciting that by the treaties of 1828 and 1833, "the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians," a described tract of seven million acres of land, and had further guaranteed to the Cherokee Nation a per-

The patent referred to in the bill was executed on December 31, 1838. It conveyed to the Cherokee Nation the lands secured and guaranteed by the treaties of 1828, 1833 and 1835. In the patent the seven million acre tract, together with the perpetual outlet, was described as one tract, aggregating 13,574,135.14 acres. In addition the patent specified the boundaries of a tract of 800,000 acres ceded by the treaty of 1835. The description of the two tracts was succeeded by the following habendum clause:

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen millions three hundred and seventy-four thousand, one hundred and thirty five acres, and fourteen-hundredths of an acre, to have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits

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petual outlet west, &c., ceded an additional eight hundred thousand acres of land, in the following terms:

"And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States in consideration of the sum of five hundred thousand dollars therefore hereby convenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land."

By article 3 of the same treaty the United States also agreed—

"that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

The act of May 28, 1830, (4 Stat. 411,) conferred authority upon the President to create districts of territory in lands west of the Mississippi to be exchanged for lands held by Indians in a State or Territory. Respecting the title to the lands so to be given in exchange, it was provided in section 3 as follows:

"SEC. 3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

The article of the treaty of 1835 upon which is based the claim that an exclusive right is vested in the Cherokee Nation to the use, control and occupancy of its tribal lands is the following (7 Stat. 481):

"ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without

prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

Averring that the Cherokee Nation and its citizens possessed the exclusive right to the use, control and occupancy of its tribal lands, it was alleged that the Secretary of the Interior, without having lawful authority so to do, was assuming the power to and was about to pass favorably upon applications for leases, and was about to grant leases of lands belonging to said nation for the purpose of mining for oil, gas, coal and other minerals, one such successful applicant being stated to be The Cherokee Oil & Gas Company, an Arkansas corporation. Based upon general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title of the nation to its said lands, and the claim that irreparable injury would be caused and wrong and oppression result, and that there would be a deprivation of property rights of the complainants and of other citizens of

their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *Provided always*, That they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the government of the same."

By the treaty of August 6, 1846, (9 Stat. 871,) providing for an adjustment of the differences theretofore existing between different portions of the people constituting and recognized as the Cherokee Nation of Indians, it was provided in article 1 as follows:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, 'to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same."

The treaty of July 19, 1866, (14 Stat. 799,) does not require particular notice.

the Cherokee Nation, an injunction was prayed against further action by the Secretary of the Interior in the premises. A demurrer was filed to the bill upon the grounds following:

"1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or to any relief.

"2. The court has no jurisdiction over the subject matter of the suit.

"3. There is a defect of parties defendant."

Without considering or passing upon the objection of a defect of parties defendant, the trial court sustained the demurrer and entered a decree dismissing the bill of complaint. This decree was affirmed, on appeal, by the Court of Appeals of the District. (— D. C. App. —.)

An appeal was thereupon taken to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The grounds of demurrer to the bill of complaint were summarized in the following reasons embodied in a statement filed with the demurrer:

"1. The matters named in the bill are matters of administration, which cannot be taken away from an executive department and carried into the courts.

"2. That the Cherokee Oil & Gas Company named in the bill is a necessary party to the suit, as shown by the bill.

"3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898, (30 Stat. 495,) which is a valid exercise of the power of Congress over the property of an Indian tribe."

Preliminary to considering the fundamental question raised by the demurrer, it is necessary to notice two subjects not expressly referred to in the opinion below. They are, first, the objection to the formal sufficiency of certain of the averments in the bill; and, second, the claim that the Cherokee Oil & Gas Company was an indispensable party defendant. With respect to the first mentioned ground of objection, without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked. So far as the second ground of objection is concerned, we presume that the courts below omitted to pass expressly thereon, because it was deemed that the company named was properly omitted from the bill. As the bill assailed generally the want of power in the Secretary of the Interior to execute leases affecting lands owned by the tribe, and referred to the application pending for a lease made by the Cherokee Oil & Gas Company, as manifesting but a particular instance in which it was charged that the Secretary of the Interior might exercise the power conferred by the statute, the corporation named was not an indispensable party to the bill. Clearly, every person with whom the Secretary might contract, if he exercised the discretion vested in him by

the statute were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionery power upon the official in question. This brings us to consider the fundamental question which the case involves, that is, the contention on behalf of the government that the decree below should be sustained because the act of June 28, 1898, is a valid exercise of power vested in Congress, and fully authorized the Secretary of the Interior to do and perform the things which the complainants seek to have him enjoined from doing.

Before noticing the pertinent provisions of the act of June 28, 1898, reference will be made to antecedent legislation by Congress which led up to the enactment of the statute in question. In the statement preceding the opinion, delivered through Mr. Chief Justice Fuller, in *Stephens* v. *Cherokee Nation*, (174 U. S. 445,) it was said:

"By the sixteenth section of the Indian appropriation act of March 30, 1893," (27 Stat. at L. 612, 645, chap. 209,) the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners 'to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.'

"The commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895, (28 Stat. at L. 939, chap. 189,) two additional members were appointed. It is commonly styled the 'Dawes Commission.'"

On November 20, 1894, and November 18, 1895, the Dawes Commission made reports of the condition of affairs in the Indian Territory. These reports, as also a report of the Senate Committee on the Five Civilized Tribes, of date May 7, 1894, were referred to and were quoted from in the statement of facts made by the court in the Stephens case. The reports asserted the existence of a state of affairs in the Indian Territory "abhorrent to the spirit of our institutions," and declared the necessity of assumption by the United States of "responsibility for future conditions in the Territory" and the need of independent legislation by Congress in that behalf. Thus, the Senate Committee on the Five Civilized Tribes of Indians, in a report on May 7, 1894, (Sen. Rep. No. 377, 53d Cong. 2d sess.,) said in part:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights unless the government does interfere to administer such trust."

By a provision in the act of June 10, 1896, (29 Stat. 321, 339,) said commission was directed to continue the exercise of the authority already conferred upon it, and was invested with further powers in respect of hearing and determining applications for citizenship in said tribes and making rolls of the members thereof.

A provision in the act of June 7, 1897, (30 Stat. 62, 84,) directed said commission to continue to exercise all authority theretofore conferred upon it to negotiate with said Five Tribes, and gave further direction respecting the making of rolls and citizenship.

The act of June 28, 1898, (30 Stat. 495,) entitled "An act for the protection of the people of the Indian Territory, and for other purposes," contains provisions for the completion of the rolls of citizenship of said tribes, for the reservation of townsites and the sale of lots therein, and for the allotment of the exclusive use and occupancy of the surface of all lands susceptible of allotment among the citizens of the respective tribes, with a provision as follows (sec. 11):

"But all oil, coal, asphalt and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such land shall carry the title to such oil, coal, asphalt or mineral deposits."

Section 13 of said act contains provisions for leasing the oil, coal, asphalt and mineral deposits as follows:

"That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys. Lessees shall pay on each oil, coal, asphalt or other mineral claim at the rate of one hundred dollars per annum in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced roy-

alty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt or other mineral is hereafter opened on land allotted, sold or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt or mineral, which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt or other mineral deposits by lessees or their assigns, which have resulted in the production of oil, coal, asphalt or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improvements of such lessees; and in all cases of the leasing or renewal of leases of oil, coal, asphalt and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior."

Section 16 contains a provision as to the payment and distribution of rents and royalties due said tribes, as follows:

"That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong."

As the acts done and contemplated to be done by the appellee and assailed by the bill of complaint, are presumably not the subject of criticism, in the event that the act of June 28, 1898, was a constitutional and valid exercise of power by Congress, we will now address ourselves to a consideration of that statute.

Prior to the act of March 3, 1871, (16 Stat. 544, 566, now section 2079 of the Revised Statutes,) which statute, in effect, voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, the customary mode of dealing with the Indian tribes was by treaty. As however held in *Cherokee Nation* v. *Southern Kansas Railway Co.*, (135 U. S. 641, 653, reaffirmed in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 484,) while the Cherokee Nation and other Indian tribes domiciled within the United States had been recognized by the United States as separate communities, and engagements entered into with them by means of formal treaties, they were yet regarded as in a condition of pupilage or dependency, and subject to the paramount authority of the United States.

Reviewing decisions of this court rendered prior to the act of 1871, and particularly considering the status of the very tribe of Indians affected by the present litigation, the court commented upon a declaration made in a previous decision that this government had "admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being invested with rights which constitute them a state, or separate community." It was observed of this declaration that it fell "far short of saying that they are a sovereign state, with no superior within the limits of its territory." Considering the treaty of 1835 with the Cherokee Nation, under which it is now claimed, on behalf of the appellants, that the Cherokees became vested with the sole control over the lands ceded to them, the court observed (p. 485):

"By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. (Revision of Indian Treaties, pp. 65, 79, 85.) But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."

It results then from the doctrine of the decisions of this court that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of administration, to which the act of June 28 was applicable, and they were solely cognizable by the executive department of the government. The decision in *Stephens* v. *Cherokee Nation*, (174 U. S. 445,) is particularly in point, as that case involved the validity of the very act under consideration, and the precedent cor-relative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed. Thus, in the course of its opinion, after alluding to the legislation concerning the Dawes Commission, the court said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. (*The Cherokee Trust Funds*, 117 U. S. 288, 308.) The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake*, (155 U. S. 196, 207,) where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: "Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them."

There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.